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Supreme Court, U.S.
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No. 10-292

In The

Supreme Court of the United States

OSCAR PEREZ, *et al.*,

Petitioners,

v.

CAREY INTERNATIONAL, INC.,
a Delaware corporation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a district court's failure to apply the objective nature of the lodestar (such as "measur[ing] the attorneys' true market value" when determining hourly rates) to a motion for attorneys' fees in a Fair Labor Standards Act retaliation case should require GVR in light of *Perdue v. Kenny A.*, ___ U.S. ___, 2010 WL 1558980 (April 21, 2010) (decided *after* the appeal was decided and petition for *en banc* was filed), when attorney Chris Kleppin had an indisputable market rate of $300/hr (five other judges awarded him $300/hr and a peer review article suggested he was worth that) but was awarded $175/hr (a paralegal hourly rate), because of the court's subjective opinion of him (which is biased – she granted Plaintiffs' recusal motion which set forth significant impropriety and bias shortly after ruling on the fee motion), and when the court awarded attorney Harry O. Boreth (a graduate of University of Pennsylvania Law School 45 years ago) $0/hr, and attorney Lloyd S. Glasser was awarded $350/hr, when their indisputable market rates are $450/hr.

II.

Should the Court resolve the split in the circuits regarding when parties agree to split the costs of a special master (fifty-fifty), and one party ultimately prevails, whether the prevailing party can tax as costs the 50% share paid for the special master; the

QUESTIONS PRESENTED – Continued

First, Second, Fifth, Eighth, and Ninth Circuits hold that a court should, *Morgan v. Kerrigan*, 530 F.2d 401 (1stCir.1976); *NLRB v. Local 3*, 471 F.3d 399 (2dCir.2006); *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5thCir.1978); *Southern Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907 (8thCir.1968); and *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471 (9thCir.1974), but the Sixth, Tenth, and Federal Circuits hold that such costs cannot be taxed. *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6thCir.1987); *ARCO v. American Airlines, Inc.*, 98 F.3d 564 (10thCir.1996); and *Dyker Bldg. Co. v. United States*, 182 F.2d 85 (Fed.Cir.1950).

PARTIES TO THE PROCEEDING

The additional petitioners are: George Powell; Francisco Rengifo; Eduardo Mazzeo; Juan Alba; Wilhelm Pereira; John Humphreys; Miomir Maksimcev.

The Eleventh Circuit in its caption of the case *sua sponte* identified the law firm of Glasser, Boreth & Kleppin, P.A. as an interested party.

The additional respondent is: Carey Limousine Florida, Inc., a Florida corporation.

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirming the Southern District Court of Florida's Order Granting in Part Plaintiffs' Motion for Attorneys' Fees is unpublished. It is included in the appendix at App. 1. The district court's Order Granting in Part Plaintiffs' Motion for Attorneys' Fees is also unpublished. It is included in the appendix at App. 17, and the Special Master's Report and Recommendation Concerning Plaintiffs' Motion for Attorneys' Fees and Costs is unpublished, and included in the appendix at App. 39. The Eleventh Circuit's denial of rehearing is also unpublished, and included in the appendix at App. 73.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on April 9, 2010. App. 1. Rehearing was denied on May 28, 2010. App. 73. Jurisdiction is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. §216(b), which states in pertinent part:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees

> affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action".

STATEMENT OF THE CASE

In September 2001, Olga Gutescu filed a lawsuit against Respondents for overtime. *Gutescu v. Carey Int'l, Inc., et al.*, Case No. 01-4026-CIV-MARTINEZ. It turned into a class action, and settled on February 24, 2004, just before trial. The *Gutescu* case was heavily litigated – approximately 500 docket entries.

In September 2003, another group of drivers (who could not join the *Gutescu* action) brought suit against Respondents. *Rodriguez, et al. v. Carey Int'l, Inc.*, Case No. 03-22442-CIV-UNGARO. *Rodriguez*, which involved numerous drivers, was settled just before trial, January, 2005. (R1-1-2). In *Rodriguez*, days after John McKnight, Rodney Walker, and Myron Lieberman filed their Notices of Consent to join lawsuits against Respondents, they were abruptly terminated, although they had worked for Respondents for years, and Walker and McKnight were in the middle of lengthy contracts of employment. (R24-1-2-¶¶1,24-31); (*See Second Amended Complaint*

in *Rodriguez*). Like *Gutescu*, the *Rodriguez* case involved approximately 500 docket entries, and the related litigation (other lawsuits that were consolidated with *Rodriguez*) involved approximately 2,000 docket entries. (*Powell*-R1-1-2). There were drivers who were not allowed to join the *Rodriguez* and related cases whose claims were brought in another suit, including George Powell.

To avoid litigation like in *Gutescu* and *Rodriguez*, attorney Kleppin tried to settle the claims of those other drivers with Respondents pre-suit, but that was not accomplished. Thus, on May 24, 2005, Powell filed a Complaint, bringing causes of action for overtime violations under the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, against Respondent Carey International, Inc. (the world's largest limousine company). (*Powell*-R1); (*Powell, et al. v. Carey Int'l, Inc., et al.*, Case No. 05-21395).

During *Powell*, Petitioners filed a motion to start a collective action, and drivers joined the suit, including numerous drivers who still worked for Respondents, namely, Petitioners in this case: Powell (his retaliation claim was brought in his own case, but transferred into this one); Oscar Perez; Francisco Rengifo; Juan Alba; John Humphreys; Miomir Maksimcev; Wilhelm Pereira; and Eduardo Mazzeo. (R24). After joining *Powell*, Petitioners were retaliated against by being given less work and by being assigned work of poorer quality – the better work was assigned to drivers who had not joined the lawsuit, and some of them were terminated. (R24-6-8¶¶16-23,32-33;

R130-28). When it became clear that Respondents were trying to influence the mediation in *Powell* by "starving" the drivers – by not assigning them work or much work – (to make them more desperate economically), Petitioners brought this suit in early September, 2006. (R1;R-24-6-¶23).

This suit was originally assigned to the Honorable Jose E. Martinez, and he issued an Order entitled Notice of Court Practices in FLSA Cases, which required Petitioners to calculate their damages. (R4). While attorneys' fees were ostensibly not lowered because of the calculation of damages in this case (at least not according to the Report and Recommendation ("R&R") and the Order adopting it), there is an undercurrent surrounding the damages (they are discussed at length in the R&R) and Respondents argued vigorously that the calculations submitted by Respondents required that attorneys' fees be not awarded at all (even though Respondents, as part of the settlement of this case, agreed not to argue that the lodestar should be reduced in this case), that warrants that they be addressed here, particularly since the court held that Petitioners' approach to damages warranted a reduced fee award, which is what the same court found in *Powell*, when it reduced attorneys' fees substantially. **Kleppin** sent a letter to defense counsel requesting various documents so that Kleppin could calculate damages, as follows:

> in order to calculate damages, I would need to see what the other drivers are earning (particularly IOs) so that I can calculate how much more those drivers earned than

> the Plaintiffs. This is essentially the measure of their damages. Certainly, looking back on prior years with respect to the amount of income that the Plaintiffs made before they filed notices of consent is helpful, such information does not obviate the need for pay records of drivers over the past two years or so to compare with what the Plaintiffs earned since they filed their notices. Accordingly, I intend to file a Motion seeking relief from the Order [the Court's Notice of Court Practices in FLSA Cases], and requesting that the Court allow us to provide the damages calculations as soon as discovery allows for such calculations. Please let me know by tomorrow at 12:00 noon whether you agree to the relief that I seek. We have spoken about it over the telephone previously.

(R108-3-4&Ex.1). Right up front, Petitioners' counsel let defense counsel know the two ways in which he believed the back pay damages could be calculated – comparing their pay to drivers who had not joined the suit, or, alternatively, by comparing their pay with the pay they earned the year before they joined the suit. Petitioners' counsel believes that defense counsel immediately calculated the Petitioners' damages using both methods. (R108-4-Exs.6,7). Petitioners made the following arguments in their Motion for Relief from the Court's Pretrial Order:

> The Plaintiffs filed their own separate lawsuit for the retaliation that they have endured (which is this suit) [after they joined the *Powell* suit], and for that retaliation seek

> compensatory damages, back pay (in the form of the difference in income they would have had had the Defendants not retaliated against them for joining the lawsuit), front pay, and other damages. In this suit, the Plaintiffs do not seek overtime or minimum wage. *In order to calculate the back pay owed to the Plaintiffs, the Plaintiffs need to compare the pay earned by other drivers to the lack of pay that they received, by not being assigned much work.* Accordingly, discovery is required before a damages estimate can be provided.
>
> On or about September 11, 2006, the Court issued its Notice of Court Practices in FLSA Cases, which orders the Plaintiffs to provide damages calculations for their overtime and minimum wage claims. Since the Plaintiffs do not have such claims, they cannot provide the information contemplated by the Order. Accordingly, the Plaintiffs request relief from the Order, and ask that damages calculations be provided after they have received the required discovery (the earnings of the other drivers).

(R-8) (emphasis added). *Respondents did not object to the relief sought in (R8) and the Motion was in fact filed as an Unopposed Motion.*

In their Initial Disclosures served on January 26, 2007, Respondents calculated that Petitioner Rengifo *owed* Carey South Florida $5,465.55, Oscar Perez *owed* Carey South Florida $4,026.00 and Juan Alba *owed* Carey South Florida $14,524.37. (R138-1&Ex.1).

Subsequently, Respondents amended their initial disclosures on or about February 4, 2007, but their damage calculations remained the same. (R138-1&Ex.2). Then, on May 9, 2007, Respondents filed Supplemental Initial Disclosures, without revising their initial damage calculations. (R138-1&Ex.3). Respondents' insistence on these inaccurate calculations impeded settlement. (R138-1). Respondents insisted that the retaliation claims would be adjudicated in their favor via summary judgment. (R138-1). These facts caused settlement to be delayed, and not anything to do with Petitioners' damages calculations, and Respondents refused to respond to settlement demands. (R138-1&Ex.5).

Petitioners filed an Answer and a Counterclaim, seeking a declaration that the drivers were really independent contractors. (R11). The case was then transferred to Judge Seitz. (R13). Petitioners filed an Amended Complaint (R24), to which Respondents again filed a Counterclaim (R34), which Petitioners moved to dismiss. (R38).

Discovery ensued, and the Respondents took lengthy depositions of the Petitioners, and Petitioners deposed approximately ten (10) witnesses, including some out of town – Houston, Texas and Jacksonville, Florida.

On May 25, 2007, about nine (9) months into the lawsuit, the Court appointed Robert E. Weisberg to be special master. (R64;R65). At a hearing on May 25, 2007, the district court brought up whether the

parties would agree to the appointment of the master. (R161-2). *At this hearing, Respondents stated that they wanted to begin treating Humphreys, Pereira, and Mazzeo as employees, which would render their Counterclaim moot.* (R161-15). *The court stated that the sessions that the master would have with the parties would not be confidential.* (R161-38). The court stated that it would appoint Weisberg "not as a mediator, but as a Special Master." (R161-47,50). Petitioners asked for the court to compel Respondents to provide a response to the damages calculation that Petitioners had provided Respondents, and although the Court thought that that seemed fair, Respondents were concerned that any such response could be used against them. (R161-50-51). The court believed that defense summary judgment motions as to the retaliation claims should not be filed. (R161-60-61).

A hearing was set before the master to take place on June 20, 2007. (R67). The purpose of the hearing was "to determine an overview of outstanding issues including a preliminary review of damage and liability claims as well as the need to modify existing pretrial deadlines." (R130-3-4). The master indicated that he could be used as a mediator, and Kleppin expressed Petitioners' frustration in that Petitioners had provided a reasonable settlement demand three (3) weeks prior which had been disregarded by Respondents. (R130-5). Although all eight (8) of Petitioners had previously been deposed, the master wanted to re-depose them. (R130-7-8). Detailed discussions then ensued concerning the case, because the master wanted to gain intimate knowledge

regarding it, and even after spending hours with it, he was not sure how to calculate damages in the case, and took with him various documents Respondents issued to the drivers concerning their pay. (R130-24-105).

On June 21, 2007, all eight (8) of the Petitioners were re-deposed by the master. (R159). Petitioners described the retaliation that they endured; John Humphreys described how drivers who had just been hired were being assigned more jobs than he, and he had been with the company for over ten (10) years. (R159-4-5,11). Humphreys described how the dispatch supervisor and a dispatcher told him that the drivers who had joined the lawsuit were being retaliated against, and that the orders to do that "came down from the top" of the company. (R159-19-21,23-25). Juan Alba described how the general manager of Respondents, Mike Sobol, told him, after Alba had complained about not receiving work, that "he told me that I was one of the guys that was involved in a lawsuit and he cannot give me work, and it was really upset[ting] for me at that time." (R159-57,69) (at page 69 stating that Sobol "told me, oh, you're one of those guys that are involved in the lawsuit" in response to Alba's claim that he was not "getting enough work"). Immediately after Alba joined the suit, he "noticed right away [he] was getting less work [which] became no work at all." (R159-60). The Respondents told Alba that he had to surrender the car that he leased from them, and which he had "equity" in, or they were going to report it stolen. (R159-67,87-88). Oscar

Perez, who had driven for Respondents since 1998 (R159-90-91), was forced by the depression and stress of financial ruin to see a neurologist and a urologist and was brought to tears in his deposition when he described how the failure of Respondents to assign him any work at all shortly after he joined the suit affected his family life – wife and children. (R159-111-13,119-20). The other Petitioners testified similarly. (R159-126-27;130-31;133-34;137;141;149-50;158-60;161-63;165-68;169-71;174-76;177-79;185-88;189-92;195-97; 206-08;209-10;225-26;229-32). Petitioner Rengifo's marriage ended up in separation because of the retaliation, and he had to ship his kids to Colombia, because he could no longer afford to care for them here. (R159-174-76).

Near the end of the hearing on June 21, 2007, the master addressed the lawyers after the last Petitioner testified, and he stated that he was going to have to consult with the court and he still was not certain how the damages would be calculated in this case. (R159-239-47).

The parties met for another hearing before the master on July 11, 2007, and again underwent a several-hour hearing regarding the following issues: 1) whether Petitioners (those who no longer worked for Respondents at that point) had termination/constructive discharge claims; 2) the methodology to calculate damages; 3) how the three Petitioners who still work for Respondents (Humphreys, Pereira, and Mazzeo) would be paid (*e.g.*, for their overtime) as they continue working; and 4) the status of the counterclaims.

(R160-5-7). Respondents sought to add to that agenda discussing summary judgment issues. (R160-7). The hearing was lengthy and the transcript shows that there were extended discussions about calculation of damages, and it is clear that such calculations were complicated in the case. (R160-3-107).

The master admitted that lost future earnings capacity and front pay are distinct and different types of economic damages. (R160-14-16) (admitting "they are distinct").

This case wound up settling, with the agreement being that the Court (through the master acting as a magistrate judge would via a report and recommendation) would determine attorneys' fees. Because the district court had not issued a ruling in *Powell*, the master stated at a hearing that he would "pretty much" "defer[ ]" to the district court's determination of Mr. Kleppin's hourly rate in *Powell*. (*Transcript* at 68, Aug. 21, 2007). While this statement was not objected to, it did not have to be, Fed. R. Civ. P. 46, and was merely a statement made by the master. Defense counsel, at a hearing, confirmed, "*So the main issue is the number of hours expended*", to which Mr. Weisberg agreed stating, "*I think essentially, yeah. Because the hourly rate pretty much is deferred to what Judge Seitz [will do concerning hourly rates]. So, it's going to be the number of hours right*". *Id.* (emphasis added). The master simply referred to the fact that his job deciding reasonable hourly rates would be made easier by the fact that Judge Seitz was going to make that ruling in *Powell*, and he

expressed his belief that it would be "pointless to do anything other than that [to award hourly rates consistent with Judge Seitz's determination]", *id.* 65, and he qualified his deference to Judge Seitz by stating that he "thought" he would "pretty much" defer to her. *Id.* 68.

On August 21, 2007, the master held a hearing "to address the language of the settlement agreement that will be ultimately executed by the parties." *Id.* 3. At that time seven (7) of the eight (8) Petitioners had agreed to settle the matter, the master had distributed a document titled, "Summary Terms of Mediated Settlement" and the counsel for the respective parties had prepared proposed settlement agreements. At the hearing, defense counsel, in referring to the *Powell* case, distinguished it from *Perez* by saying, "We didn't have a settlement and agreement that provided that as a term. That's a completely different case". *Id.* 21.

The master stated in the August 21, 2007 hearing that he would simply be determining "the number of hours" that should be compensated and that if he had any questions about those hours (*e.g.*, whether they were necessary or sufficient) he would hold another hearing to ask the lawyer any questions he might have about such entries. *Id.* 68.

Thereafter, Petitioners filed a Motion for Attorneys' Fees, and a Motion to Tax Costs. (R99;R100); 29 U.S.C. §216(b). The parties had agreed as part of the

settlement to have the master issue a R&R concerning the fees and costs just like a magistrate judge would do, and Respondents agreed not to contest prevailing party status or argue that the lodestar should be reduced. Petitioners filed their Motion to Tax Costs on October 22, 2007, seeking $24,605.45 in costs, approximately $9,200.00 of which were deposition costs and $13,133.75 of which were costs incurred by the master, what he had billed Petitioners. (R99-13).

Petitioners filed their Motion for Attorneys' Fees on October 22, 2007, and sought $204,525.00 in attorneys' fees. (R100-16). They sought an hourly rate of $270/hr for Kleppin (at the time he was charging his fee-paying clients $275/hr and had been awarded $270/hr in a fee petition in May, 2007), and $450/hr for Glasser and Boreth, as they were awarded that rate in May, 2007. (R100-7-14). In the motion, Petitioners set forth how Kleppin had considerable trial experience and has many published decisions prevailing on dispositive motions for his clients (then 192 Westlaw decisions now over 250). (R100-7-10). In early 2008, Kleppin increased his hourly rate (what he charges his fee-paying clients) to $300/hr.

Between the time that the district court ruled on the fee motion in the *Powell* case, and the master issued his R&R in this case, the master (through a hearing set by the court (R124)), invited the parties to draft a "Memorandum on the Applicability of This Court's Ruling on Plaintiffs' Motions for Attorneys'

Fees and Costs in *Powell* to the Pending Motion in Fees and Costs in *Perez*", and both parties submitted those memoranda, although the master ordered that they not be filed with the Court (and the Court affirmed that ruling in a later appeal). In Petitioners' Memorandum, they argued Kleppin's fee rate should *not* be the rate from *Powell*, as follows:

> The issue now, as raised by the Court, is whether Kleppin's hourly rate in *Powell* should apply here. With respect to the analysis of Kleppin's hourly rate, much of the analysis applied in *Powell* is not applicable to *Perez*. First, the Court in analyzing a reasonable hourly rate for Mr. Kleppin's fee relied in part, on the belief that some of the Plaintiffs actually received less than what was offered to them in pre-litigation negotiations. While we respectfully disagree with that analysis, the fact is that with respect to the *Perez* litigation, it was agreed and understood that the relief obtained would not serve as a basis for reducing fees, which was certainly done in *Powell* in determining Kleppin's hourly fee. It is not appropriate to reduce a prevailing party's attorney's hourly rate for something that happened in another case, just like an attorney cannot obtain fees for work in another case. *See Loranger v. Stierheim*, 10 F.3d 776 (11thCir.1994) (disallowing attorney from obtaining fees for work performed in a related state case).

Analyzing the hourly fee rate of Kleppin should be based on the work performed in *Perez*, not *Powell*. To review events that occurred in *Powell* to justify calculating a reasonable hourly fee rate in *Powell* would be unprecedented when they were very different cases with different issues of fact and law. In *Powell*, the Court lowered Mr. Kleppin's hourly rate because it thought that he sought "exorbitant and unsupported damages", "filed unnecessary motions", had four of his clients receive less than offers they received from the Defendants, and exhibited poor courtroom presence during hearings, and had little knowledge of evidence. (*Order* at 17-18[; R543 in *Powell*]). None of those factors are present in this case. In analyzing Kleppin's hourly fee rate and the nature of the hours expended in *Perez*, the Special Master should be making an independent recommendation based on the litigation process in *Perez*. Further, it should be noted that since Mr. Kleppin's affidavit regarding attorneys' fees, he has received the following fee awards: *Lane v. Capital Acquisitions and Mgmnt. Co.*, 2008 WL 899285 (S.D.Fla., Mar. 28, 2008) (awarding Kleppin $270.00 per hour in a plaintiff's case and Glasser and Boreth $450.00 per hour); *Herard v. ATN Restaurant, Inc.*, 2007 WL 4302703 (S.D.Fla.2007) (awarding Kleppin $250.00 per hour, as that is what he sought because that is what he charged his client).

(*Memorandum Regarding How the Fee Petition in Powell Should Not Apply in Perez* at 8-9) (district court did not allow this memorandum to be filed, but found in its order that Petitioners acquiesced to an award of $175 hourly rate for Kleppin in this case).

Despite this evidence of Kleppin's market rate, and that indisputably Petitioners argued for a higher hourly rate than that awarded in *Powell*, the master waited until early July, 2008, which was eight (8) months after the fee and costs motions were filed, and blithely followed the district court's ruling in *Powell*, awarding Kleppin a $175/hr, finding Petitioners acquiesced to $175/hr for Kleppin (despite the arguments in the above-memorandum, and despite seeking $270/hr for Kleppin in the fee motion, as opposed to the *Powell* rate). (R131).

Respondents filed a Response to both the Motion to Tax Costs and the Motion for Attorneys' Fees. Concerning the costs motion, even though costs are to be taxed as a matter of right, and Respondents were not contesting prevailing party status, Respondents argued that "Plaintiffs' Motion should be denied in its entirety." (R103-1). Ultimately, the master taxed most of the costs against Respondents, with the exception of his own costs (or at least the half of those costs Petitioners were required to pay), $13,133.75. (R131).

Concerning the Motion for Attorneys' Fees, Respondents argued that the attorneys fee award should be reduced dramatically because of the following allegations (none of which were true): damages

calculations (or the alleged delay in their provision), the time entries were incomplete, there was block-billing, some of the entries lacked specificity, there were inaccuracies in the entries, and there was unnecessary and duplicative work. (R108).

In *Powell*, the court lowered the lodestar by 67% after awarding Kleppin $175/hr, despite the Respondents admitting Kleppin should receive $200/hr. The decrease in the award of attorneys' fees in *Powell* was due to the significant reduction in the lodestar, which did not exist in this case, because the Respondents conceded that the lodestar was not to be lowered.[1] Thus, the reason for the reduction in the lodestar and the lowered hourly rates was not present in this case.

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[1] Defense counsel, at the August 21 hearing on page 20, stated, "We do not want the settlement terms disclosed. We are agreeing not to contest prevailing party for purposes of fees." The master advised Petitioners' counsel as follows:

> I said it's inconceivable that you could be precluded from being able to sort of set forth the terms of the settlement agreement in your fee submission if they were going to argue that your load star(sic) should be downgraded or reduced for lack of success or something like that. It wasn't going to happen on my report and recommendation process. . . . That would be incredulous.

Id. 20-21. Defense counsel, in referring to the *Powell* case, distinguished it from *Perez* by saying, "We didn't have a settlement and agreement that provided that as a term. That's a completely different case". *Id.*

Even defense counsel stated that this case was a "completely different case" than *Powell*.

The master chastised Petitioners' counsel for their damages calculations and litigation of the Counterclaim, and making a chart in which he simply reduced time for 1) time related to the defense of Petitioners' depositions; 2) conducting depositions; 3) time spent defending counterclaims brought by Respondents; 4) time spent on damages calculations; and 5) time spent that is unclear or imprecise, particularly without describing why that attorney time was not compensable. (R131). Petitioners moved to file the August 21, 2007 transcript and the Memorandum ordered by the master, but the court did not allow either to be filed. (R131;R141).

Petitioners filed Objections to the R&R and challenged the award of no fees to Boreth, Glasser's reduced hourly rate (only $350.00 was awarded to Glasser) and his reduced hours, Kleppin's hourly rate and reduced hours, and the failure of the master to award certain costs, including the costs associated with the master, which were over $13,000, and other issues. (R131;R138-3). The district court adopted the R&R of the master, with only minor changes due largely to arithmetic errors, and argued the costs of the master were for mediation. (R146). However, the court did make an express finding that Kleppin had "impressive credentials" as a lawyer, after it saw the legal victories that he had obtained for his clients. (R146-4-n.4).

The district court based its decision on subjective criteria (general statements that the case was not litigated well, despite the outcome and despite that Respondents never raised any such arguments at any time during the entire litigation).[2] The district court referred Kleppin to the Bar for alleged activity in 2005, and January 2006. Kleppin had a jury trial before the district court in March, 2009, in another case, *Exime v. E.W. Ventures, Inc.*, in which his client (a defendant in an FLSA case) prevailed in. Based on his client's request after having witnessed the trial, Kleppin moved to recuse the district court so that a neutral judge could hear the Respondents' motion to tax costs. Suddenly, days after the motion for recusal,

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[2] The district court had referred Kleppin to the Bar for several things (*e.g.*, 1) the trial court's allegation that undersigned counsel lied to her and misrepresented numerous material facts to her during the litigation at issue; 2) intentionally counseled his client to obstruct the discovery process (which are extremely serious Bar violations); 3) undersigned counsel "failed to provide competent representation to a client"; 4) undersigned counsel "counsel[ed] a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent"; 5) undersigned counsel "defend[ed] a proceeding [when there was no good faith basis] in law and fact for doing so that is not frivolous"; 6) undersigned counsel "knowingly disobey[ed] an obligation under the rules of a tribunal"; and 7) undersigned counsel "engage[d] in conduct in connection with the practice of law that [wa]s prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis. . . ." All of the foregoing alleged misconduct was rejected by the judge who heard the Bar case.

the Florida Bar filed a complaint in mid-2010, concerning the alleged misconduct in 2005 and January, 2006. As stated, the Bar referee found, in early 2010, in Kleppin's favor with regard to the foregoing (other than two minor issues), and the Bar did not appeal.

The Petitioners' Motion to Recuse which detailed many forms of improper conduct by the district court and obvious bias (R205), which was granted in August, 2009 (R208), though she failed to recuse herself from the *Powell* case until after an arbitration ended in May, 2010, involving some of the Petitioners – the recusal occurred in June 2010, though it was filed in August, 2009, at which time she acknowledged: "[d]ue to [her] participation in the Florida Bar complaint against Mr. Kleppin, the Court has placed his name on her [permanent] recusal list." (R620 in *Powell*).

The court then issued a Final Judgment as to the attorneys' fees and costs. (R147). An appeal followed (R151), and the Eleventh Circuit affirmed.

In early 2008, Kleppin increased his hourly rate (what he charges his fee-paying clients) to $300/hr, and while this appeal has been pending, and shortly after the district court ruled, he has been awarded that hourly rate in several published opinions. *Dent v. Giaimo*, 665 F.Supp.2d 1295 (S.D.Fla.2009) (Ryskamp, J.) (plaintiff vigorously contested the $300/hr rate – requesting award of $187.50/hr – but, court awarded $300/hr noting that "[t]he Court finds that $300 an hour is a reasonable rate for an attorney of Kleppin's

skill and experience. . . . After examining Kleppin's time sheet, the Court further finds that the time spent during the selected periods is reasonable. . . . Defendant's Motion was well-reasoned, thorough and persuasive"); *Ortiz v. D&W Foods, Inc.*, 657 F.Supp.2d 1328 (S.D.Fla.2009) (Gold, J.); *Padurjan v. Aventura Limousine & Transp. Serv., Inc.*, 2009 WL 4633526 (S.D.Fla.) (O'Sullivan, J.) ($300/hr in plaintiff's case); *Tesma v. Maddox-Joines, Inc.*, 2009 WL 230158 (S.D.Fla.2009) (Zloch, J.) ($300/hr in defense case); *Josendis v. Wall-to-Wall Residence Repairs*, 2009 WL 454558 (S.D.Fla., Feb.17, 2009) (same). What a lawyer charges his fee-paying clients "is powerful, and perhaps the best, evidence of his market rate." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11thCir.2000). A lawyer is entitled to be awarded for the entire litigation their *current* hourly rate at the time fees are decided, as it is appropriate for a court to base an attorneys' fee award on *current* hourly rates, rather than historical rates, because such an approach takes into account that the attorney was not paid for the work at the time it was performed and also accounts for inflation. *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1186 (11thCir.1993).

REASONS FOR GRANTING THE WRIT

I. The decision below (decided after *Perdue* was issued) is completely contrary to the clear holdings of this Court's recent decision in *Perdue v. Kenny A.*, ___ U.S. ___, 2010 WL 1558980 (April 21, 2010), which holds that in determining the lodestar courts must award an attorney his market rate rather than awarding a reduced hourly rate based on subjective reasons.

Shortly after the *en banc* petition was filed in this case, this Court issued a seminal opinion regarding the lodestar method. *Perdue v. Kenny A.*, ___ U.S. ___, 2010 WL 1558980 (April 21, 2010). *Perdue* reiterates the importance of objective criteria in determining the lodestar, and is a veritable treatise concerning a court's determination of the lodestar. A specific explanation for all aspects of a fee determination must be given, because without same, "adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least may appear to be influenced) by a judge's subjective opinion or the importance of the case." *Id.* *10. The Court reiterated that "in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to the prevailing market rates in the relevant community", *id.*, 6, not a subjective comparison to unidentified other attorneys. "[T]he lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he

or she had been representing a paying client who was billed by the hour in a comparable case." *Id.*

The objective nature of the lodestar "cabins the discretion of trial judges, permits meaningful review, and produces predictable results." *Id.* The Court found that the point of the lodestar is to "measure the attorneys' true market value". *Id.* *8. The Court held that "insofar as the District Court relied on a comparison of the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review" and that when lodestar determinations are based on "an impressionistic basis, a major purpose of the lodestar method – providing an objective and reviewable basis for fees – is undermined." *Id.* *10.

The reason why this Court should grant this Petition, vacate, and remand is because numerous courts have held that Kleppin's market rate is $300/hr, and it appears (or perhaps it really happened) that the district court in this case awarded Kleppin $175/hr because of her subjective opinion. The court disregarded Kleppin's market rate, and disregarded that so many other courts found that Kleppin's market rate is $300/hr, and instead issued an opinion that criticizes his perceived performance in two cases (*Powell* and *Perez*) before her that were heavily litigated. Likewise, numerous courts have held that Boreth's and Glasser's rates are $450/hr.

Since Kleppin only practices FLSA on the side of fee-paying Defendants (and has for the past three

years or so), as set forth below, it is easy to determine his hourly rate, because his hourly rate has been $300/hr for the last two and one-half years, and because a lawyer is entitled to be awarded for the entire litigation their current hourly rate, because it is appropriate for a court to base an attorneys' fee award on current hourly rates, rather than historical rates, because such an approach takes into account that the attorney was not paid for the work at the time it was performed and also accounts for inflation. *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1186 (11thCir.1993). Further, what a lawyer charges his fee-paying clients "is powerful, and perhaps the best, evidence of his market rate." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11thCir.2000).

First, concerning Kleppin's hourly rate, the court based the hourly rate on improper criteria; namely, finding deficiencies in Kleppin's work and the similarity in counsel's performance in the two cases, when defense counsel conceded that the two cases were different, and for relying on alleged conduct in another case to deny Kleppin his market rate. (R131). These are not proper criteria in which to rely when determining an appropriate hourly rate for an attorney, but rather the lawyer's market rate is the criterion. *Perdue v. Kenny A.*, ___ U.S. ___, 2010 WL 1558980 (April 21, 2010); *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11thCir.2000). Without this standard, the courts are now free to basically award whatever hourly rate that they want based on

their subjective view of what occurred in the case at hand, or, like in this case, their subjective view of what occurred in a previous, different case. The result is that there are a number of cases that award Kleppin his obvious market rate, except this one, which exemplifies the "widely disparate awards" problem that this Court in *Perdue* warned against. These same arguments apply to Boreth's and Glasser's hourly rates.

Kleppin put forth significant evidence of his market rate, as being $300/hr. *Padjuran v. Aventura Limousine & Transportation Co.*, 2009 WL 4633526 (S.D.Fla.2009) (O'Sullivan, J.) (finding Kleppin's market rate to be $300/hr despite fierce insistence by defendant to follow *Powell* and only award him $175/hr); *Dent v. Giaimo*, 665 F.Supp.2d 1295 (S.D.Fla.2009) (Ryskamp, J.) (plaintiff vigorously contested the $300.00/hr rate – requesting award of $187.50/hr – but, court awarded $300/hr noting that "[t]he Court finds that $300 an hour is a reasonable rate for an attorney of Kleppin's skill and experience. . . . After examining Kleppin's time sheet, the Court further finds that the time spent during the selected periods is reasonable. . . . Defendant's Motion was well-reasoned, thorough and persuasive"); *Ortiz v. D&W Foods, Inc.*, 657 F.Supp.2d 1328 (S.D.Fla.2009) (Gold, J.) (awarding Kleppin $300/hr, and noting that he was efficient, and based on "rates charged and approved in this district for comparable work and skill, that $300 is an appropriate hourly rate for [Kleppin]"); *Tesma v. Maddox-Joines, Inc.*,

2009 WL 230158 (S.D.Fla.2009) (Zloch, J.) (awarding Kleppin $300/hr); *Josendis v. Wall-to-Wall Residence Repairs*, 2009 WL 454558 (S.D.Fla.2009) (Zloch, J.) (same).

Before Kleppin began charging $300/hr, he charged $275/hr for several months, after having charged $250/hr since May 1, 2003. Kleppin was awarded those rates on numerous occasions including while acting as plaintiff's counsel for various plaintiffs after jury verdicts in his clients' favor, and in representing defendants who were awarded their fees (what Kleppin charged them) as a result of sanctions. *See, e.g., James v. Wash Depot Holdings, Inc.*, 489 F.Supp.2d 1341 (S.D.Fla.2007) (Dimitrouleas, J.) (awarding Kleppin $270/hr in May, 2007, after jury verdict, and awarding Glasser and Boreth $450/hr); *Lane v. CAMCO*, 554 F.Supp.2d 1345 (S.D.Fla.2008) (Marra, J.) (awarding Kleppin $270/hr after jury trial, and awarding Glasser and Boreth $450/hr); *Murray v. Playmaker Servs., L.L.C.*, 548 F.Supp.2d 1378 (S.D.Fla.2007) (Ryskamp, J.) (awarding $250/hr, because he sought that, since he charged the client that after obtaining sanctions as a defense lawyer); *Herard v. ATN*, 2007 WL 4302703 (S.D.Fla.2007) (Zloch, J.) (awarding $250/hr to Kleppin for same reason).

All of the foregoing decisions were brought to the panel, and most (all those that had been decided by then) were brought before the district court, but both courts found that a $175/hr was proper for Kleppin, $350/hr for Glasser and $0 for Boreth, which should

be vacated, given the *Perdue* holding that now requires a court to properly award a lawyer his market rate rather than issue a subjective market rate based on the relative like or dislike of the lawyer before the court.

Petitioners put forth evidence from a local survey of lawyers and their hourly rates which (when done two years before the fee petition was ruled on) demonstrated that Kleppin (while he was billing $250/hr) had one of the lowest hourly rates among his peers. (R138Ex.6). This fact supports an even higher hourly rate than Kleppin sought, much less the one that he received. This sort of evidence is supposed to be what a court relies on to determine an appropriate hourly rate in keeping with the objective lodestar standard. Therefore, the relevant market rate for Kleppin was clearly established, but the lower courts disregarded it.

The panel and the district court disregarded this established rate (and the standards used to determine it) and adopted their own totally different standard, which is now in contravention to the clear precedent of *Perdue*. This requires reversal. Kleppin has a history of what he bills his fee-paying clients (which are the majority of his cases), what he has received from other courts, and what studies have been done that opine on the rates he charges and how those rates compare to his peers. That evidence was disregarded by the panel and the district court, in favor of a subjective test of we-saw-him-in-the-litigation-and-we-know-what-he-is-worth test, which

is contrary to this Court's clear precedent (in *Perdue*) that such rates are to be determined based on objective criteria. The complete supplanting of an objective standard for such a subjective one, and the court's linking Kleppin's rate to the *Powell* case when both the master and Respondents acknowledged that the two cases are different, is contrary to *Perdue*.

The Court should consider that this is the judge who referred Kleppin to the Bar (which Bar complaint was brought shortly after Kleppin sought to recuse her from a case after he tried a jury trial before her, which Kleppin won), one of the grounds being that he was not competent, and the fee ruling made in this case (and in *Powell* too) appear to be made to bolster her Bar case against Kleppin. This is the only judge that has ignored established precedent to award Kleppin an hourly rate far lower than any other judge has ever awarded him, and far less than what he has ever charged a fee-paying client in his career. She ignored it, although the case was a complete success, and lack of success is not an issue concerning the award of attorneys' fees. This is the court when confronted with Kleppin's record on dispositive motions, admitted he had "impressive credentials". (R146-4-n.4). This is in the same order awarding him a $175/hr fee, despite the objective evidence to the contrary.

When assessing fee motions under the FLSA, the public benefit must be taken into account, because the FLSA is an important piece of social legislation. *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1306

(11thCir.2001). None was taken into account by the Court, although the Respondents are repeated, serial violators of the FLSA. The Respondents are owned by a New York private equity firm (Chartwell Investments, Inc.) that has repeatedly and intentionally failed to pay overtime because to do so would cause economic loss, because its classification of its drivers as "independent contractors" allows it to save millions on employee tax withholding.

Kleppin has concentrated in the area of labor and employment law for the past seven (7) and one-half years. Kleppin is admitted to practice law in Florida, Massachusetts, and Washington, D.C., as well as federal courts in Florida (the Northern, Middle, and Southern Districts) and the Eleventh Circuit. Kleppin has tried several FLSA and civil rights cases to verdict (both for the defense and the plaintiff side), and has been successful in trials in a variety of actions. For example, on May 28, 2010, he received a verdict from an Arbitrator (month long arbitration) in a FLSA case involving 8 plaintiffs he represented in *Powell v. Carey Int'l, Inc.*, Case No. 05-21395, on May 14, 2010; he received a verdict in his defense client's favor in *Beltran-Moya v. Hi-Tech Autobody, Inc.*, Case No. 09-21461-CIV-KING; on April 30, 2010, he received a verdict in his defense client's favor after a bench trial in a FLSA case in *Olson v. Star Lift, Inc.*, ___ F.Supp.2d ___, 2010 WL 1740694 (S.D.Fla., Apr. 30, 2010) (Martinez, J.); on February 20, 2009, he received a jury verdict in his defense client's favor in *Exime v. E.W. Ventures, Inc.*, Case No. 08-60099-CIV-SEITZ; on July 2, 2008, he received a jury defense

verdict in his client's favor in an FLSA case in *Chiever v. R.J. Schor, Inc.*, Case No. 08-60461-CIV-ZLOCH; on December 18, 2007, a jury verdict in his clients' favor in an FLSA case in *Lane v. CAMCO*, Case No. 04-60602-CIV-MARRA; and on October 18, 2007, Kleppin received a jury verdict in his client's favor in a FMLA retaliation case for $32,543.00 which is all of the money that the plaintiff sought, in *Harley v. The Health Center of Coconut Creek, Inc.*, Case No. 04-61309-CIV-GOLD. That particular case was tried three times, the first two times resulting in hung juries. On November 30, 2006, Kleppin received a jury verdict in his client's favor in *James v. Wash Depot Holdings, Inc.*, Case No. 05-60822-CIV-DIMITROULEAS, and he received a jury verdict in his client's (the Broward Sheriff's Office) favor in *Maranto v. Jenne*, Case No. 00-15951(09) (Andrews, J.) on April 24, 2006.

Kleppin currently has approximately 250 published Westlaw opinions in which he was the lead counsel, and many of these are cases published in the federal reporters involving dispositive motions decided in his clients' favor, and to the extent successful appeals are listed, he handled the appeals in those cases. *See, e.g.*, *Collado v. Florida Cleanex, Inc.*, ___ F.Supp.2d ___, 2010 WL 3023894 (S.D.Fla., July 27, 2010) (granting summary judgment in defense client's favor as to enterprise coverage in FLSA case); *Olson v. Star Lift, Inc.*, ___ F.Supp.2d ___, 2010 WL 1740694 (S.D.Fla., Apr. 30, 2010) (findings of fact and conclusions of law in his clients' favor after a bench trial); *Brillas v. Bennett Auto Supply, Inc.*, 675 F.Supp.2d

1164 (S.D.Fla.2009) (granting summary judgment for defense client in FLSA case on ground plaintiff was both exempt as a manager and as an administrative worker); *Lainez v. Francis Eng'g, Inc.*, 2009 WL 3423035 (S.D.Fla., Oct. 20, 2009) (same); *Tapia v. Florida Cleanex, Inc.*, 2009 WL 3246121 (S.D.Fla., Oct. 6, 2009) (same); *Rivera v. Fantastic Finishes Auto Body, Inc.*, 651 F.Supp.2d 1356 (S.D.Fla.2009) (same); *Zarate v. Jamie Underground, Inc.*, 629 F.Supp.2d 1328 (S.D.Fla.2009) (same); *Williams v. Signature Pools & Spas, Inc.*, 615 F.Supp.2d 1374 (S.D.Fla.2009) (same); *Josendis v. Wall-to-Wall Residence Repairs*, 606 F.Supp.2d 1376 (S.D.Fla. 2009) (same); *Dent v. Giaimo*, 606 F.Supp.2d 1357 (S.D.Fla.2009) (same); *Vallecillo v. Wall-to-Wall Residence Repairs*, 595 F.Supp.2d 1374 (S.D.Fla.2009) (same); *Auer v. Atlantic & Pacific Property Mgmnt.*, 2009 WL 63063 (S.D.Fla.2009) (obtaining denial of defendant's motion for summary judgment on the issue of the executive and administrative exemptions in a FLSA overtime case); *Monelus v. Tocodrian, Inc.*, 598 F.Supp.2d 1312 (S.D.Fla.2008) (granting summary judgment to defendant-client because defendant was local business not subject to the FLSA); *Milbourn v. Aarmada Protection Sys. 2000, Inc.*, 588 F.Supp.2d 1341 (S.D.Fla.2008) (same); *Lamonica v. Safe Hurricane Shutters, Inc.*, 578 F.Supp.2d 1363 (S.D.Fla.2008) (same); *Polycarpe v. E&S Landscaping, Inc.*, 572 F.Supp.2d 1318 (S.D.Fla.2008) (same); *Bien-Aime v. Nanak's Landscaping, Inc.*, 572 F.Supp.2d 1312 (S.D.Fla.2008) (same); *Guzman v. Irmadan, Inc.*,

551 F.Supp.2d 1368 (S.D.Fla.2008) (granting summary judgment in FLSA case based on lack of individual coverage), *aff'd*, 322 Fed. Appx. 644 (11thCir.2009); *Casseus v. First Eagle, L.L.C.*, 2008 WL 1782363 (S.D.Fla.2008) (same); *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223 (S.D.Fla.2008) (same), *aff'd*, *Navarro v. Broney Automotive Repairs, Inc.*, 314 Fed. Appx. 179 (11thCir.2008), *cert. denied*, 129 S.Ct. 507 (2008); *Malin v. Town of Davie*, 2008 WL 2752707 (Broward Cty. Cir. Ct., June 4, 2008) (granting summary judgment in favor of defense client concerning the retaliation, discrimination, and harassment claims brought by two employees under the Florida Civil Rights Act) (Moe, J.), *aff'd*, 22 So.3d 88 (Fla. 4th DCA 2009); *Delisle v. LGY Corp.*, 2008 WL 1821518 (S.D.Fla., Apr. 16, 2008) (granting summary judgment in FLSA case because lack of enterprise coverage); *Murray v. Playmaker Servs., L.L.C.*, 512 F.Supp.2d 1273 (S.D.Fla.2007) (granting summary judgment in favor of his defense clients in FLSA case for overtime brought by outside salesperson); *Sweat v. Town of Davie*, 2007 WL 3234638 (Broward Cir. Ct. 2007) (Damoorgian, J.) (granting summary judgment in favor of defense client on retaliation claim under Florida Civil Rights Act); *Powell v. Carey Int'l, Inc.*, 483 F.Supp.2d 1168 (S.D.Fla.2007) (granting summary judgment in favor of his plaintiff clients as to motor carrier and taxicab exemptions); *Rossi v. Associated Limousine Serv., Inc.*, 438 F.Supp.2d 1354 (S.D.Fla.2006) (same); *Cartun v. Carey Int'l, Inc.*, Case No. 04-21074-CIV-UNGARO-BENAGES (Dec. 10, 2004) (same);

Lieberman v. Corporate Connection Lines, Inc., 2005 WL 5501491, *2 (S.D.Fla.2005) (same); *Powell v. Carey Int'l, Inc.*, 490 F.Supp.2d 1202, 1209-1212 (S.D.Fla.2006) (same); *Harley v. The Health Ctr. of Coconut Creek, Inc.*, 487 F.Supp.2d 1344 (S.D.Fla.2007) (denying defendant's motion for summary judgment in FMLA retaliation case); *Rozenblum v. Ocean Beach Properties*, 436 F.Supp.2d 1351 (S.D.Fla.2006) (granting summary judgment in his defendant client's favor in a FLSA overtime case); *Lane v. Capital Acquisitions and Management Co.*, 2007 WL 676019 (S.D.Fla.2007) (denying defendant's motion for summary judgment in his plaintiff client's case); *Spencer v. Regional Acceptance Corp.*, 2006 WL 4590707 (S.D.Fla.2006) (same); *Ponce v. Cingular Wireless, L.L.C.*, 2005 WL 5454213 (S.D.Fla.2005) (same); *Mohamed v. Publix Super Markets, Inc.*, 2004 WL 5320631 (S.D.Fla.2004) (same); *Gutescu v. Carey Int'l, Inc., et al.*, 2004 WL 5333762 (S.D.Fla.2004) (same); *Gutescu v. Carey Int'l, Inc., et al.*, 2004 WL 5333763 (S.D.Fla.2004) (same); *Lamour v. Applied Card Sys., Inc.*, 2003 WL 2553716 (S.D.Fla.2003) (same); and *Fields v. Laboratory Corp. of Am.*, 2003 WL 25544257 (S.D.Fla.2003) (same).

Further, as defense counsel, undersigned counsel has persuaded numerous courts to grant motions to dismiss, dismissing his clients from the case. *Ortiz v. D&W Foods, Inc.*, 657 F.Supp.2d 1328 (S.D.Fla.2009) (dismissing case for lack of subject matter jurisdiction over FLSA defense client and awarding attorneys'

fees against plaintiff's counsel); *Martinez v. MTEL-One, Inc.*, 2009 WL 2014609 (M.D.Fla.2009) (dismissing case on ground brought in court which did not have venue over Mr. Kleppin's client); *Ali v. Prestige Window & Door Installation, L.L.C.*, 2009 WL 927947 (S.D.Fla.2009) (dismissing case brought against Kleppin's client a local employer on the ground business not subject to the FLSA); *Tesma v. Maddox-Joines, Inc.*, 254 F.R.D. 699 (S.D.Fla.2008); *Herard v. ATN Restaurant, Inc.*, 2007 WL 4145879 (S.D.Fla.2007); *Casseus v. R&J of South Florida, Inc.*, 2007 WL 2376242 (S.D.Fla.2007) (dismissing case for FLSA defense client because of improper joinder); *Brooks v. Jenne*, 2005 WL 5432453 (S.D.Fla.2005) (dismissing defense client in §1983 case); *Brooks v. Jenne*, 2005 WL 5488060 (S.D.Fla.2005) (dismissing defense client in §1983 case); *Tropical Aviation v. Broward County*, Case No. 04-60416 (Aug. 10, 2005) (dismissing case in docket entry 50); *Troxell v. C S C Enterprises, Inc.*, Case No. 04-21312 (S.D.Fla., Oct. 24, 2005) (dismissing case and sanctioning plaintiff's counsel in docket entry 33); *Smith v. Jenne*, 2004 WL 5375369 (S.D.Fla.2004) (dismissing race and gender discrimination case); *Sweat v. Town of Davie*, 2004 WL 5354051 (Broward Cty. Cir. Ct. 2004) (dismissing sexual harassment claim).

Kleppin began charging $300/hr in the beginning of 2008, and thus has had, including but not limited to, the following fee-paying clients paying that amount. *See, e.g.*, *Davis v. American Cigarette*, Case No. 08-61798-CIV-COHN; *Josendis v. Wall-to-Wall*

Residence Repairs, Case No. 08-61175-CIV-ZLOCH; *Fernandez v. Quality Removal*, Case No. 08-22892-CIV-MARTINEZ; *Martinez v. Cancun Grill*, Case No. 08-23362-CIV-GRAHAM; *Dent v. Giaimo*, Case No. 08-81191-CIV-RYSKAMP; *Williams v. Signature Pools*, Case No. 08-22388-CIV-UNGARO; *Cubias v. Larios*, Case No. 08-22716-CIV-ALTONAGA; *Saucedo v. Phoenix Auto*, Case No. 08-21156-CIV-ALTONAGA; *Ali v. Prestige Windows & Doors, L.L.C.*, Case No. 08-80863-CIV-MIDDLEBROOKS; *Lamonica v. Safe Hurricane*, Case No. 07-61295-COHN; *Palma v. Safe Hurricane*, Case No. 07-22913-CIV-SIMONTON; *Dicter v. Kare Pharmacy*, Case No. 08-62074-CIV-JORDAN; *Ortiz v. D&W Foods*, Case No. 09-60008-CIV-GOLD; *Scott v. Secure Resources*, Case No. 09-60056-CIV-ALTONAGA; *Louisme v. Big T*, Case No. 09-60194-CIV-COHN; *Rivera v. Fantastic Finishes*, Case No. 09-60474-CIV-LENARD; *Gamboa v. American Fitness*, Case No. 09-61177-CIV-MARRA; *Lira v. Matthew's Marine*, Case No. 09-61178-CIV-ZLOCH; *Bryan v. Carpet Replacement*, Case No. 09-61458-CIV-COHN; *Meininger v. Recovery Place*, Case No. 09-61497-CIV-JORDAN; *Orelien v. Georgia Pig*, Case No. 09-61620-CIV-ZLOCH; *Orelien v. Georgia Pig*, Case No. 10-60004-CIV-ZLOCH; *Vallecillo v. Wall-to-Wall Residence Repairs*, Case No. 08-22271-CIV-UNGARO; *Beltran-Moya v. Hi-Tech Autobody*, Case No. 09-21461-CIV-KING; *Olson v. Star Lift*, Case No. 09-21500-CIV-MARTINEZ; *Tapia v. Florida Cleanex*, Case No. 09-21569-CIV-UNGARO; *Avila v. Weiss & Woolrich*, Case No. 09-21575-CIV-MORENO; *Barrera v. Weiss & Woolrich*, Case No. 09-21841-CIV-GRAHAM;

Jones v. Carswell Property, Case No. 09-22027-CIV-GRAHAM; *Arilus v. DiEmmanuele*, Case No. 09-22185-CIV-HOEVELER; *Martinez-Pinillos v. Air Flow Filters*, Case No. 09-22453-CIV-MARTINEZ; *Amechazurra v. Vicky Bakery*, Case No. 09-22697-CIV-JORDAN; *Barrera Solano v. Party Production*, Case No. 09-22487-CIV-ALTONAGA; *Ramos v. Weiss & Woolrich*, Case No. 09-23243-CIV-HUCK; *Collado v. Florida Cleanex*, Case No. 09-23303-CIV-UNGARO; *Rakip v. Paradise Awnings*, Case No. 10-20004-CIV-COOKE; *Orellana v. Weiss & Woolrich*, Case No. 10-20137-CIV-MORENO; *Zarate v. Jamie Underground*, Case No. 08-14212-CIV-MARTINEZ; *Weaver v. Bayside Cooling*, Case No. 09-14143-CIV-MOORE; *Williams v. BAT Construction*, Case No. 09-10091-CIV-MOORE; *Tesma v. Maddox-Joines*, Case No. 08-81095-CIV-ZLOCH; *Brilias v. Bennett Auto*, Case No. 09-80068-CIV-RYSKAMP; *Betancourt v. Elite Tile*, Case No. 09-80082-CIV-HURLEY; *Rodgers v. Global Prophets*, Case No. 09-80753-CIV-DIMITROULEAS; *Walker v. Americare*, Case No. 10-60340-CIV-MOORE; and *Guevara v. Weiss & Woolrich*, 10-21177-CIV-MARTINEZ.

II. The Court should resolve the split in the Circuits on the issue of when parties agree to split the costs of a special master, whether the prevailing party may tax the costs paid to the master.

The Court should resolve the split in the circuits regarding when the parties agree to split the costs of

a special master fifty-fifty, and one party ultimately prevails, whether the prevailing party can tax as costs the 50% share paid for the special master. The First, Second, Fifth, Eighth, and Ninth Circuits hold that a court should, *Morgan v. Kerrigan*, 530 F.2d 401 (1stCir.1976); *NLRB v. Local 3*, 471 F.3d 399 (2dCir.2006); *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5thCir.1978); *Southern Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907 (8thCir.1968); and *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471 (9thCir.1974), but the Sixth, Tenth, and Federal Circuits hold that such costs cannot be taxed. *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6thCir.1987); *ARCO v. American Airlines, Inc.*, 98 F.3d 564 (10thCir.1996); and *Dyker Bldg. Co. v. United States*, 182 F.2d 85 (Fed.Cir.1950). Because of the split in the circuits, when parties (like in this case) agree to split a master's costs, they should have certainty concerning whether they have to pay them. In this case, the Petitioners seek to have the significant sum (to them) that they paid in master's costs taxed as costs.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

August, 2010

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16115

D. C. Docket No. 06-22225-CV-PAS

OSCAR PEREZ,
FRANCISCO, RENGIFO,
JOHN HUMPHREYS,
JUAN ALBA,
WILHELM PERIERA,
ED MAZZEO,

Plaintiffs-Counter-
Defendants-Appellants,

MIOMIR MAKSIMCEV,
GEORGE POWELL,

Plaintiffs-Appellants,

DIMITRE KARABOYTCHEV, et al.,

Plaintiffs,

LAW FIRM OF GLASSER, BORETH & KLEPPIN, P.A.,

Interested Party-Appellant,

versus

CAREY INTERNATIONAL, INC.,
a Delaware corporation qualified to
do business in the State of Florida,
CAREY LIMOUSINE FLORIDA, INC.,
a Delaware corporation qualified to
do business in Florida,

Defendants-Counter-
Claimants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 9, 2010)

Before O'CONNOR,* Associate Justice Retired, CARNES and ANDERSON, Circuit Judges.

PER CURIAM:

This appeal is about attorney's fees and costs in a retaliation lawsuit brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* A court-appointed special master helped the parties settle the lawsuit, and the parties agreed to have him consider the plaintiffs' motion for attorney's fees and costs as if he were a magistrate judge. Plaintiffs' counsel requested $204,525 in fees. The special master issued a report and recommendation that the plaintiffs' attorneys should be awarded a total of $94,080 in fees and $9,342.43 in costs. Those amounts reflected a reduction in the compensable hours and the hourly rates of the lawyers and a reduction in the amount of costs requested.

While the special master's report was being considered by the district court, plaintiffs' counsel moved to put into the record a transcript of a session

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* Honorable Sandra Day O'Connor, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

that the parties had with the special master on August 21, 2007. The district court denied that motion after finding that the transcript was a record of confidential settlement negotiations.

The district court adopted the special master's report and recommendation in its entirety, except that the court lowered the recommended amount of attorney's fees by $2,397.50. Eight of the plaintiffs and the law firm of Glasser, Boreth & Kleppin, P.A. have appealed the district court's fees and costs judgment.

I.

"We . . . review the district court's award of attorneys' fees and costs for abuse of discretion, revisiting questions of law de novo and reviewing subsidiary findings of fact for clear error." *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation,* 442 F.3d 1283, 1287 (11th Cir. 2006). "In reviewing the district court's hourly rate determination, an appellate court must be mindful that, although an attorney fees award is reviewed for abuse of discretion, the determination of what constitutes a reasonabl[e] hourly rate is a finding of fact subsidiary to the total award and is therefore reviewed under the clearly erroneous standard." *ACLU of Ga. v. Barnes,* 168 F.3d 423, 436 (11th Cir. 1999) (quotation marks and alteration omitted).

II.

The plaintiffs contend that the district court abused its discretion by finding that attorney Harry O. Boreth was not entitled to any fees. They also contend that the court should not have reduced Chris Kleppin's and Lloyd Glasser's hourly rates and the number of hours that they claimed. The plaintiffs also challenge the district court's refusal to tax as costs the special master's fees and the costs associated with two depositions taken by plaintiffs' counsel. Finally, they contend that the district court abused its discretion by finding that the transcript of the parties' session with the special master on Aug. 21, 2007, was an inadmissible record of confidential settlement negotiations.[1] We will address each of those contentions in turn.

A.

The plaintiffs sought $17,820 in fees for 39.6 hours of work done by attorney Boreth at an hourly rate of $450. The district court awarded nothing. Conducting a lodestar analysis, the court found that all of Boreth's time "duplicate[d] the work performed by Attorneys Kleppin and Glasser," which led it to

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[1] We reject the plaintiffs' argument that the special master erred by failing to hold a fee hearing. When determining reasonable attorney's fees, "[o]ccasionally, evidentiary hearings are necessary." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). Not always, but only occasionally. *See id.* This was not one of those occasions.

conclude that none of Boreth's time was reasonably expended on the litigation. (R.4-146 at 3.) The court reinforced that conclusion with its finding that the quality of Kleppin's work did not reflect guidance from a senior attorney. (*See id.*)

The plaintiffs assert that district court should have counted Boreth's work on the following tasks: (1) reviewing and signing the scheduling report; (2) reviewing the scheduling order and ensuring that the dates were properly calendared and scheduled; (3) drafting proposed settlement agreements and an ADEA addendum; (4) working all day at mediation on July 27 with law partners Glasser and Kleppin. The plaintiffs argue that Boreth's presence was required at the mediation because there were many clients who had different demands, offers, and responses to offers. They assert that the district court erred by concluding that none of Boreth's time was compensable. Their position is that because they were the prevailing party in the litigation, and Boreth was one of their attorneys, they should be awarded a lodestar amount of fees for his legal work on their behalf.

The lodestar is calculated using "'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Kenny A. ex rel. Winn v. Perdue,* 532 F.3d 1209, 1219 (11th Cir. 2008) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983)), *cert. granted,* 129 S. Ct. 1907 (2009). The lodestar is "'the guiding light of our fee-shifting jurisprudence.'" *Id.* (quoting *City of Burlington v. Dague,* 505 U.S. 557, 562, 112 S. Ct.

2638, 2641 (1992)). Redundant, excessive, or otherwise unnecessary hours should not be included in the calculation of hours reasonably expended. *Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939-40. Even when a party prevails, the district court still must determine whether time was reasonably expended, and if it was not, that time should be excluded from the fee calculation. *See id.*

In the present case the district court properly conducted a lodestar analysis and did not err in its application of the law to the calculation of Boreth's compensable fees. Because the record supports the district court's finding that the time expended by Boreth was redundant, excessive, or otherwise unnecessary, the court did not abuse its discretion by concluding that none of Boreth's time was compensable.

B.

The plaintiffs sought $15,660 in fees for attorney Glasser based on 34.8 hours of work at an hourly rate of $450. The special master recommended reducing Glasser's hourly rate to $350 and his compensable hours to 29.1 for a total fee of $10,185. The special master found that $350 an hour was a reasonable rate for Glasser because of the "nature of the work performed by Mr. Glasser, his background and experience, and his limited participation in this lawsuit." (R.4-131 at 13.) The district court adopted those findings. The plaintiffs contend that the district court

should have calculated the lodestar for Glasser using an hourly rate of $450 because that is Glasser's usual rate, and the record contains no basis for reducing it.

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). Although "limited participation" is not a proper basis for reducing an attorney's hourly rate, the "nature of the work" and the "background and experience" of the attorney are proper considerations. We cannot conclude that the district court clearly erred by considering those factors and setting Glasser's hourly rate at $350.

In calculating Glasser's number of compensable hours, the district court acted within its discretion. The court adopted the special master's findings that set out the precise time entries by Glasser that were disallowed, resulting in a reduction of compensable hours. All of the disallowed time involved consultations between multiple partners or one partner's review of another one's work. Based on those findings, the district court's decision that the hours it disallowed were duplicative or unnecessary did not amount to an abuse of discretion. *See Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939-40.

C.

1.

The plaintiffs contend that the district court erred when it set attorney Kleppin's hourly rate at $175. In their sessions with the special master, the plaintiffs did not submit expert fee affidavits because the master planned to set the hourly rate as it was determined by the district court in a related case, *Powell v. Carey International, Inc.*, 547 F. Supp. 2d 1281 (S.D. Fla. 2008).[2] In his report the special master noted, "At the time the parties agreed to have me issue this report and recommendation[,] they were aware that I had intended to rely on the hourly rates utilized by the Court in the not yet issued *Powell* fee orders in my report. At that time, neither party objected." (R.4-131 at 13 n.9.) The plaintiffs' objections quickly arose, however, after the district court decided to set Kleppin's hourly rate at $175 in *Powell*.

In *Powell* the plaintiffs sought $481,887 in attorney's fees, and the district court awarded plaintiffs $88,623.15 in fees. 547 F. Supp. 2d at 1283. Kleppin sought fees for 1,534.6 hours of work at $270 per hour. *Id.* at 1284. The district court found that Kleppin's "conduct in this case . . . bears directly on the proper hourly rate and the amount of hours for

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[2] The plaintiffs, defendants, counsel for both sides, district judge, magistrate judge, and special master were the same in the present case and in the *Powell* case.

which he should be compensated." *Id.* at 1286. The court had this to say about Kleppin:

> Unfortunately, Plaintiffs' counsel was never able to grasp or was unwilling to acknowledge the simple legal nature of this case. . . . Even responding to Defendants' strenuous defense, this case could have and should have been litigated in less than a third of Kleppin's time. The disturbing undercurrent in this case from the outset has been on what will ultimately generate the greatest fees rather than legitimate recovery for Plaintiffs.
>
> Furthermore, Plaintiffs' counsel's lack of understanding of the substantive and evidentiary law, repeated failures to comply with Court directions and rules, as well as their failure to exercise the critically important independent judgment, prolonged the litigation and generated unnecessary work for both counsel and the Court. This fact bears significantly on the appropriate hourly rate and number of hours that the Court can consider as reasonable in light of the nature of the case.

Id.

Specifically, the court criticized Kleppin's "unrealistic and legally unsupportable damage calculations" and pointed out that some of the plaintiffs received less than they would have if they had settled their claims before this lawsuit was filed. *Id.* at 1286-88. The court took into account what it described as Kleppin's "actions in demanding grossly inflated and

totally unsupported damage claims and ignoring settled law. . . ." *Id.* at 1289. The court explained that it had appointed a special master (the same one as in the present case) to help Kleppin "learn the procedures for preparing for trial, including the organization of relevant evidence and the calculation of damages, and to help him learn to present the legal aspects of the case to a court." *Id.* at 1290 n.12. The court also criticized Kleppin's motions practice, finding that he "filed multiple motions that often were a waste of time, money and resources." *Id.* at 1290.

As for Kleppin's hourly rate, the court found that "[b]ased on the quality of the papers filed, the in-court presentations and the repeated lack of familiarity with his evidentiary obligations, Kleppin's performance was more akin to a new associate and the customary rate in the community for all associates is in the range of $150 to $350." *Id.* at 1294. The court exercised its independent judgment, *see Norman,* 836 F.2d at 1303, and determined that a rate of $175 was appropriate for Kleppin. 547 F. Supp. 2d at 1294. After hearing oral argument, this Court affirmed the district court's judgment. *Powell v. Carey Int'l, Inc.*, 323 Fed. App'x 829 (11th Cir. Apr. 21, 2009) (unpublished).

Even in the face of the affirmance of the *Powell* judgment, which included an hourly rate of $175 for Kleppin, the plaintiffs contend that is not a reasonable hourly rate for him. They point out that Kleppin has been awarded higher hourly rates in other cases. They argue that the *Powell* case is different from the

present one, suggesting that the factors leading to a reduced hourly rate in that case do not justify one here.

We disagree. The special master and the district court specifically found that the quality of Kleppin's work product in the present case revealed some of the same deficiencies that the court had also identified in *Powell*. In determining a reasonable hourly rate, "[a] court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (quotation marks omitted). In determining a reasonable hourly rate, a court may assess the skills of the lawyers and the quality of the representation in the case currently before the court. *See Turner v. Sec'y of Air Force*, 944 F.2d 804, 808-09 (11th Cir. 1991) (affirming district court judgment that took into account counsel's work product, preparation, and general ability when setting an hourly rate). We cannot conclude that the district court clearly erred by finding that the hourly rate it awarded to Kleppin in the *Powell* case was also an appropriate hourly rate for the present case based on the similarity of his performance in both cases. *Cf. Norman*, 836 F.2d at 1299 (stating that a reasonable hourly rate may be determined based on "similar services by lawyers of reasonably comparable skills").

2.

The plaintiffs also contend that the district court abused its discretion by reducing Kleppin's number of compensable hours. Their arguments about reduction of time are either conclusory, composed of rhetorical questions, or are otherwise unpersuasive. The district court reduced Kleppin's number of compensable hours based on a detailed chart evaluating precisely which hours were unnecessary, imprecisely logged, excessive, or redundant.

That chart shows that the largest single block of time disallowed is 34.3 hours for work defending against the defendants' counterclaims. (R-4.131 at 11.) The special master concluded that it was "[n]on-compensable work as not related to prosecution of FLSA claims." (*Id.*) The district court agreed. (R-4.146 at 7.)

The sole basis for the plaintiffs' argument that they should have been compensated for their counsel's work on the counterclaims is rooted in *Lawrence v. Credit Thrift of Am., Inc.*, 622 F.2d 1207 (5th Cir. 1980).[3] There is a problem with their reliance on that decision, which is that the decision was vacated when the case was taken en banc. 628 F.2d 931 (5th Cir. 1980) (en banc). The en banc opinion in *Lawrence*

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

held that the "portion of the opinion of the district court which denies plaintiff recovery of attorney's fees for time spent in defending the compulsory counterclaim is affirmed by an evenly divided court." *Lawrence v. Credithrift of Am., Inc.*, 644 F.2d 506 (5th Cir. 1981). As a result, that part of *Lawrence* has no precedential value. *See Lacy v. Gen. Fin. Corp.*, 651 F.2d 1026, 1028 (5th Cir. Unit B July 1981) ("An affirmance by an evenly divided court, however, has no precedential value. . . .").

In the *Lacy* opinion, our predecessor court explained that the Truth in Lending Act permits the award of reasonable attorney's fees if those fees are incurred in order to enforce TILA liability. *Id.* at 1029. The counterclaim in *Lacy*, which was for the balance of underlying debt, was related to the TILA claim and was a compulsory counterclaim. *Id.* at 1027, 1029. The court held, however, that the prevailing plaintiff could not collect attorney's fees incurred in the defense of the counterclaim because it did not arise under TILA. *Id.* That reasoning applies with equal force to the Fair Labor Standards Act claims in the present case. Furthermore, as the district court recognized, time spent on discrete and unsuccessful claims is not compensable. *See Hensley*, 461 U.S. at 434-35, 103 S. Ct. at 1940; *Norman*, 836 F.2d at 1302. Thus, the district court correctly concluded that the time plaintiffs' counsel spent on the counterclaims was not compensable.

D.

The plaintiffs sought $26,605.45 in costs, but the court awarded only $9,342.43. The largest cost item requested, and disallowed, was for payment of $13,133.75 for the services of the special master. The district court's order appointing the special master had authorized him to apportion his costs between the parties. *See* Fed. R. Civ. P. 53(g) (relating to compensation of a special master and the allocation of payment between the parties). The special master recommended that his costs should be shared equally by the parties, basing that recommendation "on the reasons for [his] appointment, the role that [he] played in the proceedings[,] and [his] observation of the litigation." (R.4-131 at 18.) The district court agreed. (R.4-146 at 9.)

The plaintiffs rely on *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1323-24 (5th Cir. 1978), *overruled on other grounds by, Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983), to argue that special master costs are to be paid to the prevailing party even if, when the master was appointed, the parties agreed to each pay half of the master's costs. *See id.* ("The trial court also taxed the defendants as costs $3,000 which initially had been assessed against the plaintiffs as their share of the special master's fee. . . . The fact that the trial court appointed the master constitutes a sufficient showing that the master's services were necessary. It was thus within the scope of the trial court's discretion to award as costs to the prevailing party their share of

the special master's fee."). But *Carpa* did not hold that it was mandatory for the district court to award special master costs to the prevailing party, only that it was within the court's discretion to do so. *See id.* Moreover, *Carpa* probably did not survive *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S. Ct. 2494 (1987). In *Crawford Fitting* the Supreme Court limited the taxation of costs to those set forth in 28 U.S.C. §§ 1821 and 1920. *See id.* at 441-42, 107 S. Ct. at 2497. Neither section permits the taxation of the fees of a special master as costs. *See* 28 U.S.C. §§ 1821, 1920.

The district court was authorized to split the cost of the special master's services between the parties, *see* Fed. R. Civ. P. 53(g), and it provided legitimate reasons for doing so. There was no abuse of discretion.[4]

E.

The plaintiffs contend that the district court abused its discretion when it prohibited them from filing as part of the record the transcript of a settlement session with the special master on August 21, 2007. The plaintiffs sought to file that transcript to

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[4] The plaintiffs alternatively argue that the special master is really an expert, and therefore his fees are taxable under 28 U.S.C. § 1920(6). We disagree. The special master functioned as a special master, not as a court-appointed expert, and his fees are not taxable as costs. *See Crawford Fitting*, 482 U.S. at 441-42, 107 S. Ct. at 2497.

support their assertion that statements made by the special master during the August 21 session are inconsistent with his later recommendations about attorney's fees. In their reply brief to this Court, the plaintiffs quoted extensively from the parts of the transcript that they believed supported their arguments. Even if we were to consider the excerpts from the transcript that the plaintiffs rely on, we still find their arguments unpersuasive. We are not convinced that the district court abused its discretion by refusing to admit and consider the transcript of the August 21 hearing, and we are convinced that it would have made no difference.[5]

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[5] We deny as moot both the plaintiffs' motion to file with this Court the transcript and a related memorandum and the defendants' motion "to strike (disregard)" the portions of the plaintiffs' reply brief that quote from the transcript.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-22225-CIV-SEITZ/O'SULLIVAN

OSCAR PEREZ, et al.,

Plaintiffs,

v.

CAREY INTERNATIONAL, INC., et al.,

Defendants. /

ORDER AFFIRMING REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTIONS FOR ATTORNEYS' FEES AND COSTS WITH SLIGHT AMENDMENTS

THIS CAUSE is before the Court on the Report and Recommendation ("Report") of the Special Master, Robert E. Weisberg, on Plaintiffs' motions for attorneys' fees and costs [DE 99, 100]. Plaintiffs commenced this action for retaliation in violation of the Fair Labor Standards Act ("FLSA") on September 5, 2006. On May 25, 2007, because the parties were experiencing conflicts in narrowing down the factual and legal issues relating to liability and damages, at the parties' request the Court appointed Robert E. Weisberg to serve as Special Master.[1] (*See* DE 65.)

[1] The Order appointing Mr. Weisberg as Special Master stated that "the parties shall pay to the special master $350 per

(Continued on following page)

The parties then elected to use Mr. Weisberg as a mediator to resolve the dispute. (*See* DE 92.) Mr. Weisberg also served as the Special Master in a related matter between the same parties for FLSA overtime wages. (*See Powell v. Carey International, Inc.*, 05-21395-Civ-Seitz.) After the matter had been resolved, the parties agreed that Plaintiffs' motions for attorneys' fees and costs would be considered by Mr. Weisberg, who would make a report and recommendation to the Court. (*See* DE 101, n.1.) The Special Master's Report is currently pending before the Court. The Special Master recommends that Plaintiffs' motions be granted in part and denied in part and that Plaintiffs be awarded $94,080.00 in attorneys' fees and $9,342.43 in costs.[2] Both Plaintiffs and Defendants have filed objections to the Special Master's Report. Having reviewed the Report, the parties' objections, the entire factual record and the relevant legal authorities *de novo*, the Report is affirmed with the very minor amendment of $2,397.50 in fees as the parties have not met the threshold of "clearly erroneous or contrary to law."

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hour for his services. The special master shall submit a recommendation to the Court apportioning the cost of his services."

[2] Plaintiffs' attorneys' fees and cost application sought $204,525.00 in attorneys' fees and $26,605.45 in costs.

I. Standard of Review

During the May 25, 2007 hearing, the parties agreed that this Court would review the Special's Master's Report under the same standard as that of a magistrate judge. (*See* DE 64, "Order on May 25, 2007 Hearing;" DE 65, "Order Appointing Mr. Robert Weisberg as Special Master;" DE 138, Plaintiffs' Objections at 4.) The determinations of a magistrate judge are subject to a "clearly erroneous or contrary to law" standard of review by the district court. 28 U.S.C. § 636(b)(1)(A). With this standard in mind, the Court turns to the objections of the parties.

II. Plaintiffs' Objections

Plaintiffs challenge the fee award for each of Plaintiffs' three attorneys, the cost award, and the Special Master's decision that the August 21, 2007 settlement hearing transcript not be filed. The Court has conducted a *de novo* review of each of Plaintiffs' objections.

A. Attorney Boreth

With regard to Plaintiffs' counsel Boreth, the Special Master ruled that "none of the requested time is compensable."[3] Plaintiff's object to the Special Master's conclusion arguing that he erred by ignoring

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[3] Plaintiffs requested compensation for 39.6 hours of work for Boreth at $450 per hour, totaling $17,820.00.

the lodestar analysis. Moreover, Plaintiffs argue that the Special Master's citation to the *Powell* order on attorneys' fees was an error because, Plaintiffs argue, *Perez* has nothing to do with *Powell*.

Plaintiffs' objections are rejected for two reasons. First, the Special Master did not "ignore" the lodestar analysis, rather he found that none of the time entries submitted by Plaintiffs for Boreth were reasonable and compensable. The burden rests on a plaintiff to submit a request for fees that will enable the court to determine what time was reasonably expended on the federal litigation. *See Loranger v. Stierheim*, 10 F.3d 776, 782 (11th Cir. 1994). Moreover, in determining whether the number of hours expended on the litigation was reasonable, the district court should exclude from its initial fee calculation "hours that are excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Here, the Special Master found that none of Boreth's time was reasonable because "[b]ased on the submissions provided to the [Special Master], it was not clear how Attorney Boreth's work contributed to the prosecution of the lawsuit and did not otherwise duplicate the work performed by Attorneys Kleppin and Glasser." (*See* Report at 13.) Moreover, the Special Master stated that "[t]he overall quality of the Plaintiffs' attorneys' work product [did] not reflect guidance or direction from a senior attorney." (*See id.*) Thus, the Special Master based his determination that Boreth did not reasonably expend any time on this case on specific findings adhering to the lodestar analysis.

Second, the Special Master's reference to the *Powell* order did not indicate that he relied on Boreth's actions in *Powell* to assess his entitlement to fees in the instant case. Rather, the Special Master simply cited this Court's Order in *Powell* for the proposition that attorneys' may not be compensated for time spent that does not further the prosecution of an action. Moreover, the Special Master served a pivotal role in each case, which gave him the opportunity to make a comparison based on his personal knowledge and observations. Thus, Plaintiffs' argument that Boreth's performance in *Powell* must be completely divorced from his performance in *Perez* is not persuasive. The Court holds, therefore, that the Special Master did not err in denying Boreth's application for fees.[4]

B. Attorney Glasser

With respect to Attorney Glasser, the Special Master recommended that he be given an hourly rate of $350 for 29.1 hours.[5] The Special Master specifically stated that his determination of the appropriate rate for Glasser was "based on [his] observation of the

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[4] Plaintiffs include a lengthy footnote enumerating the successes that Attorney Kleppin has had in various cases in support of their argument that Glasser and Boreth were proper mentors to Kleppin. Notwithstanding such impressive credentials, such facts do not have any relevance in the instant matter.

[5] Plaintiffs requested compensation for 34.8 hours of work for Glasser at $450 per hour, totaling $15,660.00.

nature of the work performed by Mr. Glasser" and that there was no evidence that Glasser "guided or directed Mr. Kleppin through the prosecution process." (Report at 13.) Plaintiffs object to the decrease in Glasser's rate as well as the specific time entries that were disallowed.

The Court overrules these objections to the Report as the recommendations are not clearly erroneous or contrary to law. The hourly rate determination was not without basis; in addition to the nature of the work performed by Glasser, the Special Master acknowledged Glasser's "background and experience" as well as Glasser's "limited participation in [the] lawsuit." (*Id.*) The Special Master addressed factors relevant to hourly rate calculation, and thus did not err in his recommendation.

In regards to Glasser's compensable time, the Special Master determined that Glasser's "time expended at mediation and settlement contributed to Plaintiffs' prosecution of the lawsuit," (*Id.*) By contrast, the Special Master found Glasser's participation unnecessary on two occasions and duplicative on two others. (Report at 13 n.8.) The Special Master therefore acknowledged Glasser's effectiveness while also critiquing Glasser's dispensability and the economy of force applied to the task. Because these factors may form the basis for reductions in compensable time, the Special Master did not err in disallowing time entries pursuant to these factors. *See Hensley*, 461 U.S. at 434. Thus, the Court holds that the

Special Master did not err in his recommendation for Glasser's fees.

C. Attorney Kleppin

The Special Master recommended that Attorney Kleppin be paid at a rate of $175.00 for 492.1 hours.[6] Plaintiffs first object to the Special Master's reference to *Powell*. They contend that the fee in *Powell* dictated the Special Master's findings in this case.[7] Plaintiffs argue that because the Special Master did not make an independent finding for Attorney Kleppin, the standard of review applicable to the rest of the report should not apply here. Next, Plaintiffs contend that recent Eleventh Circuit precedent compels a presumption that the hourly rate sought in the application is appropriate because the rate sought is near the midpoint or low end of the relevant legal market, citing to *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209, 1226 (11th Cir. 2008). Plaintiffs also object to the Special Master's finding of imprecise time entries, unnecessary time calculations and depositions, and non-compensable time expended on Defendants' counterclaims. Each objection will be taken in turn.

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[6] Plaintiffs' sought compensation for 633.3 hours of work at $270.00 per hour, totaling $170,991.00.

[7] As noted in footnote 9 of the Report, the parties did not object when the Special Master advised them that he would use whatever were the hourly rates that the undersigned would use in its determination of fees in the related *Powell* case.

As is clear from the factual recitation in the Report's Background Section, the Special Master found some of the same deficiencies in Plaintiffs' counsel's work product in this case as were identified in *Powell*. There is no factual basis to disturb the hourly rate determination, given the similarity in counsel's quality of performance and his four year experience as a member of the bar. Furthermore, because Kleppin was already familiar with the issues presented in the depositions, Kleppin's preparations exceeded the time necessary, and were therefore excessive. (*See* Report at 10.) The Special Master's mention of *Powell* does not warrant a change in the standard of review and is not contrary to law.

Plaintiffs' argument for a presumption in favor of the sought-after hourly rate is without merit. *Kenny A.*, the Eleventh Circuit case cited in support of Plaintiffs' argument, addresses the issue of enhancements to the lodestar figure. Far from establishing a presumption in favor of the sought-after rates, the opinion criticizes the use of affidavits of lawyers with an "obvious self-interest" in determining the compensable fee. *Kenny A.*, 532 F.3d at 1232. Plaintiffs reading of *Kenny A.* is both incorrect and reflects an unfortunate tendency to misread the law. The Court declines Plaintiffs' invitation to apply a presumption in favor of the sought-after hourly rate.

Plaintiffs also object to the Special Master's treatment of time entries. Time entries that are unclear or vague are not compensable. *See Scelta v. Delicatessen Support Services, Inc.*, 203 F.Supp.2d

1328, 1334 n.2 (M.D. Fla. 2002). The Special Master found that many of the time entries proffered by Kleppin were imprecise and reduced the compensable hours accordingly. The Special Master grounded this finding upon his "review of the parties' submissions." (Report at 10.) The Court cannot hold that the Special Master clearly erred when, after a review of the parties' submissions, the Court agrees that he properly reduced the compensable fee because of the Plaintiffs' imprecise entries.

The Special Master found that Kleppin's "work product was riddled with deficiencies," and because such deficiencies resulted in time spent recalculating back pay and damages, such time was unnecessary and excessive. (*See* Report at 11.) Plaintiffs object that time spent on recalculations is a part of employment litigation and should thus not be disallowed. The Special Master's determination was based on his evaluation of the necessity of the task; Plaintiffs may disagree with the determination, but it is neither unsupported by the record nor contrary to law.

The Special Master disallowed time related to the depositions of Danny Troyano and Robert Davis because "they had little knowledge remotely relevant to the *Perez* litigation." (Report at 10.) The Special Master found that the time spent was not "reasonably necessary to the prosecution of this case." (*Id.*) Plaintiffs object that the Special Master did not appreciate the value of deponents' testimony. While the plaintiffs may dispute the value of deponents' testimony, the finding cannot be said to be clearly erroneous. The

Special Master grounded his decision on his extensive knowledge of the litigation, "[his] observation of the litigation activities of counsel, . . . items in the court's docket and the overall litigation history." (*Id.*). Thus, it was not contrary to law to find that time spent on these depositions was unnecessary.

Finally, the Plaintiffs object to the Special Master's disavowal of time spent defending counterclaims. Plaintiffs cite a Truth in Lending Act ("TILA") case from the former Fifth Circuit for the proposition that fees for compulsory counterclaims are compensable. *Lawrence v. Creditthrift of Am., Inc.*, 622 F.2d 1207 (5th Cir. 1980). To be sure, time spent on compulsory counterclaims may be compensable. However, time expended upon "discrete and unsuccessful claims" must be excluded. *Hensley*, 461 U.S. at 434; *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1301-02 (11th Cir. 1988). The Special Master states, consistent with Plaintiffs' admission, that the counterclaims "were separate and discrete from the issues litigated in their FLSA retaliation claim." (*See* Report at 10 n.7; DE 27 Ex. 1 at 7.) In the event the time is otherwise compensable, the Special Master states that the sought-after time should be severely reduced because much of the time expended on the counterclaims was unnecessary.

This Court determined that the counterclaim at issue in this case presented "a federal claim providing an independent basis for subject matter jurisdiction." (DE 94 at 5.) The Court recognized, as Plaintiffs had, that the counterclaim was distinct from Plaintiffs'

retaliation claim. Thus, the Special Master's characterization of the counterclaim as separate and discrete provides a sound basis upon which to exclude time expended on these claims.

In sum, the Special Master's findings with respect to Plaintiffs' counsel are not contrary to law or clearly erroneous. Far from "subvert[ing] the private attorney-general concept," the Special Master's findings are based on his observations of the parties, knowledge of the case, and review of the relevant docket entries. The Court denies the objections of Plaintiffs' counsel.

D. Objection to Cost Award

The Special Master found that Plaintiffs should be awarded costs in the sum of $9,342.43. Plaintiffs object to this sum, asserting that the Special Master fees of $13,133.75 should be included as an expert cost taxed on Defendants. Plaintiffs argue that the parties previously agreed to tax the reasonable costs of Plaintiffs, and contend that binding precedent commands that a Special Master's fees are to be taxed, citing *Capra, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1323-24 (5th Cir. 1978).[8]

The Special Master did not include his fees in taxable costs because he was not a court appointed

[8] Plaintiffs' factual and legal analysis on this issue is illustrative of their approach to the case.

expert witness. (*See* Report at 18.) Pursuant to the Court's Order of Appointment [DE 65], the Special Master then recommended to the Court that his fees be shared equally by the parties. (*See id.*) Plaintiffs' objection must be overruled for three reasons.

First, Plaintiffs' Costs Motion clearly sought to tax the Special Master's fees, described in the motion as "Mediation Services," under 28 U.S.C. §1920(6). (*See* DE 99 at 12.) Section 1920(6) authorizes the recovery of fees paid to court-appointed *expert witnesses* and interpreters.[9] The Special Master was neither an expert witness nor an interpreter. At the parties' request, the Court appointed Mr. Weisberg to consider and make recommendations on disputed factual and legal issues and to mediate the case. His services helped the parties achieve resolution of this case in a cost-efficient manner in marked contrast to the conduct of litigation in the *Powell* case prior to his appointment there as a Special Master.

Second, Congress specified those costs taxable against a losing party in 28 U.S.C. §1920. Those are the only costs that are taxable. The services of a special master are not included under §1920. The Fifth Circuit decided *Capra,* the authority on which Plaintiffs' rely, prior to the United States' Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons,* 482 U.S. 437 (1987). There, the Supreme Court

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[9] An award of expert fees under §1920(6) is limited to a statutory rate of $40 per day pursuant to 28 U.S.C. §1821.

held that when a prevailing party seeks reimbursement under §1920 for expert witness fees, a federal court is bound by the limits of 28 U.S.C. §1821(b) and courts do not have the power to tax costs except as prescribed by Congress.

Finally, Plaintiffs' position in this case regarding Special Master's fees is inconsistent with their position in *Powell* in which they did not seek to recover the Special Master's fees as costs. In the Order appointing the Special Master, the Court asked the Special Master to make a recommendation as to the apportionment of the fees, as a mechanism to ensure the parties' cost efficient use of the Special Master. Based on the Special Master's recommendation that his fees be shared equally, it appears that the mechanism had the intended effect. If the issue of the Special Master's fees was important to Plaintiffs, their settlement could have addressed those fees, but obviously did not. For these reasons, the Court will not tax the Special Master's fees.

E. Settlement Hearing Transcript

The Special Master determined that the parties should not be permitted to rely on or file with the Court the transcript of the August 21, 2007 settlement hearing the parties had with him. (*See* Report at 19.) Plaintiffs assert that the transcript should be left to public view. They argue that the transcript is supportive of other objections made to the Special Master's report.

The Special Master found that the transcript should not be filed with this Court because: (1) the hearing was convened solely for the purpose of facilitating the settlement of the case; (2) the parties' communications during the hearing were settlement generated and related; and (3) the Plaintiffs did not challenge the language of the settlement agreement. (*See id.*) The Special Master concluded that the entire proceeding, including the transcript, was an inadmissible communication under Fed. R. Ev. 408. (*See id.*)

Plaintiffs argue that a prohibition on filing is only warranted where extraordinary circumstances require it and no such circumstances exist here. However, Plaintiffs' argument is misplaced. At issue here is whether a settlement proceeding transcript should be filed for the purpose of disputing a fee award as a result of the settlement. Confidentiality is often an important element in successful settlements. In this case, the Court does not know the settlement amount except for the two settlements it reviewed *in camera* [DE 96, 101] pursuant to *Lynn's Food Stores, Inc. v. Department of Labor*, 679 F.2d 1350, 1353 (11th Cir.1982). The parties agreed to the confidentiality of the settlement discussions. Rule 408 bars the admission of confidential settlement evidence such as this. *Reynolds v. Roberts*, 202 F.3d 1303, 1318 (11th Cir. 2000) ("while normally a court may use as evidence statements made during negotiations to interpret ambiguous gaps in consent decrees, Rule 408 precludes such evidence to prove liability for or invalidity of [a] claim or its amount"). Having agreed

to have the settlement sessions be confidential, the Plaintiffs cannot now change position because they want to use the statements therein to enhance their position as to liability for fees. Plaintiffs' objection fails.

For the foregoing reasons, the Court rejects Plaintiffs' objections.

III. Defendants' Objections

Defendants object to the determinations made by the Special Master with regard to attorney Kleppin's compensable time in the following categories: (1) defense of Plaintiffs' depositions; (2) unnecessary depositions; (3) time expended on counterclaims; (4) time spent on damage calculations; (5) unproductive time entries; (6) block billing; and (7) imprecise and clerical time entries. In sum, they seek to reduce the total amount of compensable fees by an additional $54,127.50. While the Defendants' attention to detail is admirable, sometimes such strengths taken to extreme result in waste under a cost-benefit analysis. Defendants' objections are also reviewed *de novo*.

A. Defense of Plaintiffs' Depositions

The Special Master reduced two entries related to Plaintiff Mazzeo's deposition by a total of 2 hours because he found these hours excessive. (*See* Report at 11.) Defendants argue that the Special Master should have excluded an additional three entries

related to Plaintiff Mazzeo's deposition in their entirety, totaling 11.9 hours. Defendants contend that these entries should be excluded because these entries are similar to those deducted from Plaintiff Rengifo's deposition. The Court disagrees; it is not clear that the entirety of the three entries are excessive. Defendants do not explain the grounds for excluding these three entries in their entirety. Further, Defendants do not articulate the similarities between the entries deducted from Plaintiff Rengifo's deposition and the entries permitted from Plaintiff Mazzeo's deposition. Therefore, the Special Master's failure to deduct in this instance is not clearly erroneous or contrary to law.

B. Unnecessary Depositions

The Special Master disallowed entries related to the depositions of Danny Troyano and Robert Davis because he found these depositions unnecessary. (*See* Report at 10.) Defendants object to the Special Master's failure to disallow two additional entries related to the depositions of Danny Troyano and Robert Davis, totaling 12.7 hours. Because the Special Master found these depositions to be unnecessary, Defendants are correct in stating that all time entries related thereto should be disallowed. Therefore, the entries relating to the depositions of Robert Davis and Danny Troyano should be excluded. Because, however, both the July 19 and July 23 entries include preparation for depositions other than those of Robert Davis or Danny Troyano, the Court will deduct only

an additional 6.7 hours from the compensable fee. (*See* DE 100, Ex. 4 at 36, 38.)

Defendants also object to the Special Master's failure to exclude 0.3 hours related to Ahmed Young's deposition because he was never deposed. Further, Defendants object that because the Special Master found discovery costs related to Key Transportation and Aventura Limousine unnecessary, he should have also excluded 1.3 hours from the compensable fee because the entities were never deposed.

Defendants correctly note that these hours are unnecessary; 0.3 hours related to Ahmed Young's deposition should be excluded because he was not deposed. Further, because costs relating to Key Transportation and Aventura Limousine were deemed unnecessary, hours expended should also be excluded. (*See* Report at 16-17.) Because entries relating to Ahmed Young, Key Transportation, and Aventura Limousine should have been excluded, the Court will deduct an additional 1.6 hours from the compensable fee.

In a separate instance, the Special Master reduced two entries – one on July 10 and another on July 18 – related to the deposition of Larry Sachett by at total of 5 hours because he found these hours excessive and the entries imprecise. Defendants object that a July 16 entry regarding Larry Sachett's deposition should also be excluded because any more time spent on his deposition must be excessive. However, Defendants do not explain why the entire

entry should be excluded. Further, the Special Master did not ground the July 10 and July 18 exclusions solely on excessiveness; rather, he also couched the July 10 and July 18 exclusions in the imprecision of the entries. Defendants do not show that the Special Master failed to exclude the July 16 entry because it was imprecise. Therefore, the Special Master's determination is not clearly erroneous and Defendants' objection is rejected.

C. Time Expended on Counterclaims

The Special Master deemed time related to Defendants' counterclaims non-compensable. Defendants object that the Special Master failed to exclude three entries related to the counterclaims, totaling 7.3 hours. Because the Special Master correctly deemed time related to Defendants' counterclaims non-compensable, all similar entries should be disallowed. Thus, the three entries totaling 7.3 hours should be excluded. Defendants also point out several typographical errors in the Special Master's description of non-compensable entries related to counterclaims. Specifically, the Special Master's exclusions for May 30 and June 6 overstate time spent on the counterclaims by a total of 2.9 hours.[10] (*See id* at 11; DE 100 Ex. 4 at 21-22.) Controlling for

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[10] The Court has found that a typographical error misstated the recommended compensable fee. (*See* Report at 14, 19.) Therefore, the Court will make a further reduction in the compensable fee by $175.00.

the typographical errors, the Court will deduct an additional 4.4 hours from the compensable fee.

D. Time Spent on Damages Calculations

The Special Master reduced hours spent calculating damages because work product deficiencies caused Plaintiffs to expend unnecessary time on their calculations. (*See* Report at 11.) Defendants argue that the Special Master erred in failing to exclude additional entries related to Plaintiffs' damages calculations. Defendants explain that Plaintiffs counsel's work product is more deficient than the Special Master admits, and therefore at least 30 hours in additional deductions are required. However, it is not clear that all the time entries in question are infected by deficiencies in Plaintiffs' counsel's work product; it is conceivable that the time expended was not entirely unproductive. Defendants fail to show how the entries at issue are exclusively the province of deficient work product, and therefore the objection fails.

E. Unproductive Time Entries

The Special Master disallowed discovery costs because they were unnecessary. (*See* Report at 16-17.) Defendants object to the allowance of entries for time they claim is similarly unnecessary and unproductive. Defendants point to a March 16 entry regarding limitations on depositions, March 1 and July 2 entries reviewing separate litigation against Defendants, and

a June 29 entry evaluating the prospects of summary judgment. However, it is not clear that these entries were unproductive. Thus, merely because Plaintiffs never filed a motion for summary judgment does not deem the time spent making that decision unproductive. Further, evaluating separate litigation and deposition orders is conceivably productive in coordinating strategies and determining where to invest resources. The Special Master was not in clear error in this determination and therefore the Defendants objection is rejected.

F. Block Billing

The Special Master excluded a June 20 entry because it was imprecise, excessive, and it included block billing. (*See* Report at 12.) Defendants request that the Court exclude an additional 211 hours of entries for improper block billing. Upon review of the time entries at issue, the Court finds that the Special Master did not clearly err in failing to exclude entries totaling 211 hours. Defendants do not explain why the entries they cite should be excluded in their entirety. Further, Defendants fail to show why the entries they cite should be excluded in their entirety solely because they include multiple entries. Therefore, Defendants' objection is unavailing.

G. Imprecise and Clerical Time Entries

Defendants also object that an additional 100 entries totaling 17.8 hours should be excluded

because they are imprecise. Further, Defendants object that 6.7 hours should be excluded because these entries are clerical. The objections regarding imprecise and clerical entries fail because Defendants do not specifically explain why the entries they cite are imprecise or clerical. Based upon the Court's review of these entries, the Special Master did not clearly err in failing to exclude the entries.

IV. Conclusion

For the reasons discussed above, the Court will affirm and adopt the thoughtful and well-reasoned Report and Recommendation of the Special Master as to costs and as to fees, with an amendment to attorney Chris Kleppin's compensable fee. Thus, the Court will reduce the recommended compensable fee for attorney Chris Kleppin from $86,117.50 to $83,895.00; the Court will affirm and adopt the recommended compensable fee of $10,185.00 for attorney Lloyd Glasser and no fee for attorney Harry Boreth.

Therefore it is

ORDERED that

1) Plaintiffs' Objections to the Special Master's Report and Recommendation [DE 138] are DENIED.

2) Defendants' Objections to the Special Master's Report and Recommendation [DE 137] as to costs are DENIED and as to fees are DENIED for the most part and GRANTED as set forth above.

3) The Report and Recommendation is Affirmed and Adopted as an Order of this Court with the **$2,397.50** reduction as noted to attorney Chris Kleppin's fee award so that the total fee award shall be **$94,080.00** and the costs award shall be **$9,342.43**. The Court will enter judgment to this effect in favor of Plaintiffs Oscar Perez, Francisco Rengifo, John Humphreys, Miomir Maksimcev. Juan Alba, Wilhelm Periera, and Ed Mazzeo and against Defendants Carey International, Inc. and Carey Limousine Florida, Inc.

4) Defendants' Motion for Leave to File Combined Surreply [DE 110] is DENIED as MOOT.

5) All other pending motions not ruled upon are DENIED as MOOT and this case remains CLOSED.

DONE AND ORDERED in Miami, Florida, this 26th day of September, 2008.

/s/ Patricia A. Seitz
PATRICIA SEITZ
UNITED STATES DISTRICT JUDGE

cc:
Robert Weisberg, Special Master
Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 06-22225-CIV-SEITZ/MCALILEY

OSCAR PEREZ, et al.,

Plaintiffs,

vs.

CAREY INTERNATIONAL, INC., et al.,

Defendants. /

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTIONS FOR ATTORNEYS' FEES AND COSTS

Pending before the Special Master are Plaintiffs' Motions For Award of Reasonable Attorneys' Fees and Costs in which Plaintiffs seek to recover $204,525.00 in attorneys' fees and $24,605.45 as reimbursement for litigation costs pursuant to the terms of settlement agreements between the parties. (D.E. # 99 and # 100.) Defendants have filed memoranda with supporting exhibits in opposition to the Motions, (D.E. # 103 and 104.) Pursuant to the agreement of the parties, the undersigned has submitted this Report and Recommendation to the Honorable Patricia A. Seitz following a careful review of the parties' submissions, applicable legal authorities and an analysis of the proceedings. No evidentiary hearing has been requested.

I. BACKGROUND

A. Parties & Claims

On September 5, 2006, eleven (11) Plaintiffs, OSCAR PEREZ, FRANCISCO RENGIFO, JOHN HUMPHREYS, MIOMIR MAKSIMCEV, DIMITRE KARABOYTCHEV, JUAN ALBA, TOMAS GONZALEZ, WILHELM PEREIRA, NICK ANDRADE, ED MAZZEO, and ALAN LEAVITT, limousine drivers for Defendants Carey International, Inc. and Carey Limousine Florida, Inc., filed this complaint alleging that, after they sued Defendants in a separate lawsuit styled *Powell, et al. v. Carey International, Inc., et al.*, Case No.:05-21395-CIV-SEITZ (S.D.Fla.) filed on May 24, 2005 claiming overtime and minimum wage violations under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, that Defendants retaliated against them in violation of 29 U.S.C. § 215(a)(3) by assigning them less work and inferior work than drivers who did not participate in the lawsuit. (*See* D.E. #1, ¶21.)[1] Plaintiffs sought backpay and front pay, an equal amount as liquidated damages, compensation for loss of future earning capacity, emotional distress damages and attorneys' fees and costs. (*Id.* ¶35.)[2]

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[1] The *Powell* case and entries to the docket of that case that are relevant to this Order will be referred to as "(*Powell*, D.E. # ___.)

[2] The *Perez* lawsuit was initially assigned to Judge Martinez and was transferred to this Court through Orders entered on November 7, 2006. (*See* D.E. # 19 and # 20).

B. Motions to Sever and Additional Pleading

On September 27, 2006, Defendants sought to sever each of the Plaintiffs' claims and to stay the claims of four (4) Plaintiffs, KARABOYTCHEV. GONZALEZ, ANDRADE, and LEAVITT, to permit arbitration of their claims if they so chose. (D.E. # 10.) At the same time, Defendants filed an Answer and Counterclaims directed to the "non-arbitration" Plaintiffs. (D.E. # 11.) Defendants' counterclaims sought declaratory relief to determine whether the Independent Operator ("IO") Agreements between the Defendants and six of the seven "non-arbitration" Plaintiffs were viable and enforceable.[3] On October 13, 2006, Plaintiffs filed an Amended Complaint which asserted additional claims under the Florida's private-sector Whistleblower's Act, § 448.101, Fla. Stat. (2007). (D.E. # 24.) On November 14, 2006, Plaintiffs substantively opposed Defendants' Motion to Sever and Stay Pending Arbitration. (D.E. # 28.)

On November 15, 2006, Defendants moved to strike the Amended Complaint since it had been filed without leave of court and for entry of default judgment on its counterclaim. (D.E. # 29.) The same day, the Court granted Defendants' Motion to Sever the four (4) "arbitration" Plaintiffs.[4] (D.E. #31.) On

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[3] No counterclaim was directed to Plaintiff Maksimchev.

[4] On February 5, 2007, the Court denied Plaintiffs' Motion to Modify its prior order severing the four arbitration Plaintiffs. (D.E. # 50.)

November 20, 2006, the District Court dismissed a similar counterclaim filed by these Defendants against the same Plaintiffs in the *Powell* case based on judicial economy and because it more appropriately applied in *Perez*. (*Powell*, D.E. # 245.) On November 28, 2006, Defendants filed an Amended Answer and Counterclaim. (D.E. # 34.)

On January 11, 2007, the Court entered a scheduling order which established pre-trial deadlines and set the trial for November 26, 2007. (D.E. # 43).

C. Appointment of a Special Master

Because the parties were "experiencing conflicts in narrowing down the factual and legal issues relating to liability and damages," the District Court appointed a Special Master on May 25, 2007. (D.E. # 65.) The Court instructed the Special Master to aid "the parties in narrowing the disputed factual and legal issues relating to both potential damages and liability as well as to resolve any discovery disputes that should arise." (D.E. # 65.) As a means to narrow the dispute, and to "make preliminary determinations as to both factual and legal issues" the Special Master was directed to "schedule meetings with each individual Plaintiff and Defendants' representatives so each side can present evidence in a summary fashion." (D.E. # 65.)

1. Litigating the Counterclaims

Prior to the appointment of the Special Master, on November 14, 2006, Plaintiffs moved to dismiss the counterclaims. The counterclaims were extensively litigated by the parties between November, 2006 and September, 2007. (D.E. # 27, 28, 33, 34, 36, 38, 39, 40, 64, 66, 69, 72, 73, 74, 77, 78, 79, 80, 81, 82, 87, and 94.)

At the May 25, 2007 hearing before the District Court, the parties' counsel discussed the factual circumstances surrounding the six Plaintiffs subject to the counterclaims. Based upon Plaintiffs' counsel representations and agreement to provide declarations from Plaintiffs ALBA, HUMPHREYS, PEREZ, and RENGIFO, the Court was prepared to find the counterclaims moot as to these Plaintiffs because their IO agreements were no longer in force. The counterclaims would continue as to Plaintiffs MAZZEO and PEREIRA. (D.E. # 64.) Plaintiffs' were ordered to submit these declarations by June 1, 2007. (D.E. # 64.)

Notwithstanding the May 25, 2007 hearing, during June, 2007, additional litigation ensued concerning the declarations to be filed by certain Plaintiffs to resolve the counterclaims. *See* (D.E. # 66, 69, 70, 71, 73, 77, 78, 79, 80, 81, and 82.) On June 1, 2006, declarations of Plaintiffs ALBA, PEREZ, RENGIFO, and HUMPHREYS were filed with the Court. (D.E. # 66.) On June 5, 2007, Defendants moved to strike the declarations since they failed to

comply with Plaintiffs' counsels' representations at the May 25, 2007 hearing. (D.E. # 69.) On June 14, 2007, the Court granted Defendants' Motion to Strike these Declarations and required Plaintiffs to submit new declarations adhering to Plaintiffs' counsel's representations at the May 25, 2007 hearing by June 18, 2007. (D.E. # 77.) On June 18, 2007, amended declarations were filed. (D.E. # 79, 80.) On September 14, 2007, the Court denied Plaintiffs' motion to dismiss the counterclaim. (D.E. # 94.)

2. Plaintiffs' Damage Calculations

During June and July, the undersigned conducted multiple conferences with the parties' counsel to continue to streamline factual and legal issues and to ascertain Plaintiffs' damage estimates and calculations.

At the time of my appointment, Plaintiffs' damage calculations were neither grounded in the governing law or relevant facts. For example, Plaintiffs' January 26, 2007 Initial Rule 26 Disclosures lacked individualized damage calculations for each Plaintiff, lacked essential time frames during which each Plaintiff was allegedly entitled to back pay, and contained no estimates of back pay based on earnings data available for Plaintiffs which would have been in the possession of each Plaintiff. Plaintiffs' Initial Disclosures also indicated that all Plaintiffs sought a front pay remedy without regard to Plaintiffs' employment status with Defendants or the law governing

awards of front pay. Finally, Plaintiffs sought an unspecified amount of damages representing "lost future earnings capacity" for all Plaintiffs. (D.E. # 104, Ex. B.)

On March 2, 2007, Plaintiffs submitted their First Supplemental Rule 26 Initial Disclosures which contained individual computations of damages for each Plaintiff. (D.E. # 104, Ex. C.) Plaintiffs' damage calculations, however, remained deficient. As a result, at a June 21, 2007 hearing, I questioned each Plaintiff regarding: (1) the factual basis of their retaliation claim; and (2) their request for backpay and compensatory damages. The Plaintiffs' candid and forthright answers simply underscored the problems with Plaintiffs' Supplemental Disclosures. Specifically, in calculating back pay relief, Plaintiffs sought back pay based on the reduced amount received from Defendants after they commenced participation in the *Powell* lawsuit. However, Plaintiffs failed to account for obvious mitigating factors that would have reduced any back pay calculation, including times after the alleged retaliation commenced when an individual Plaintiff was not available for work assignments. For example, Plaintiff George Powell acknowledged that, after he filed a notice of consent to join the lawsuit, his driver's license was suspended on multiple occasions which would have prevented him from accepting any driving assignment. Mr. Powell also testified about numerous problems with his vehicle which also prevented him from working, These periods of time during which Plaintiffs were unavailable to work

were not accounted for in the damage calculations. Similarly, although Plaintiffs' lawsuit sought damages resulting from an alleged constructive discharge of Plaintiffs MAKISIMCEV and POWELL, the governing law provides no arguable factual basis for these claims. Finally, Plaintiffs' damage calculations sought front pay for several Plaintiffs, including HUMPHREYS, MAZZEO, and PEREIRA, who remained employed with Defendants and thus would not have been entitled to front pay under any circumstances. In my letter to counsel dated July 5, 2007, I instructed Plaintiffs to calculate their back pay in accordance with their historical earnings, accounting for all periods of time when the Plaintiffs were unavailable to work.

Following a July 11, 2007 Status Hearing in a continuing effort to streamline the litigation, I required Plaintiffs to indicate whether any Plaintiff continued to seek relief for the "loss of future earning capacity," and whether Plaintiffs MAKSIMCEV and POWELL continued to assert termination and/or constructive discharge claims. I also required Defendants to submit information regarding any changes in compensation for 10 agreements since January 1, 2005.

3. Settlement Conferences

On July 27, 2007, I met with the parties and their counsel in a settlement conference. At that conference, Plaintiffs POWELL and HUMPHREYS

resolved their claims with Defendants. On August 7, 2007, I met individually with the remaining Plaintiffs and their counsel.[5] All but one of the remaining Plaintiffs – ALBA, MAKSIMCEV. PEREIRA, PEREZ and RENGIFO – agreed to accept settlement offers previously made by Defendants during the July 27, 2007 session. Each settlement resolved all claims, except that Defendants agreed to pay Plaintiffs reasonable attorneys' fees and costs in an amount to be decided by the Court upon Plaintiffs' motion and proof. The parties further agreed that, if the parties were unable to agree on language to be incorporated into their written settlement agreement, I would be the final arbiter of the agreement.

On August 21, 2007, after circulating a proposed settlement agreement, I conducted a conference with counsel to identify and resolve remaining differences in the language to be included in the written settlement agreements. Subsequently, I finalized settlement agreements which were ultimately executed by the parties. The remaining Plaintiff, MAZZEO, also subsequently reached settlement with Defendants and the Court entered Orders of Dismissal on September 18 and 25, 2007, for the six Plaintiffs (D.E. # 96) and for Plaintiff MAZZEO on October 30, 2007 (D.E. # 101.)

At the time that this lawsuit was settled, the parties were litigating fees and costs in the *Powell*

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[5] Plaintiff Periera participated by telephone.

case. As part of the *Perez* settlement, it was agreed that I would issue a report and recommendation on fees and costs to the Court which should be treated with the same deference by the District Court Judge as if issued by a Magistrate Judge in accordance with S.D.Fla. Local Magistrate Rule 4. The Defendants also agreed not to contest Plaintiffs' status as prevailing parties for purposes of a fees award and, since the settlement amounts in *Perez* were confidential, the Defendants agreed not to argue that the loadstar (hours reasonably expended multiplied by reasonable rates) should be reduced based on results obtained.[6] It was also understood that, since the *Powell* fees motions were pending before this Court, I would defer to the *Powell* fees order to determine reasonable hourly rates, As a result, the parties did not submit expert fee affidavits to support requested hourly rates.

D. Powell Fee and Cost Orders

On May 11, 2008, this Court entered two Orders in *Powell,* on Plaintiffs' separate motions for fees and costs. (*Powell,* D.E. # 542-543.) *Powell* and *Perez* were treated by the Court as related cases from the time *Perez* was transferred to this division. Multiple pretrial proceedings in the cases were consolidated. (*See, Powell,* D.E. # 240, 324, 377); (*See,* also D.E. # 50, 60, 77, 127.) The *Perez* retaliation claims flowed directly

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[6] This did not limit Defendants' rights to contest the calculation of reasonable hours.

from the *Powell* lawsuit. The cases involved similar parties and the same counsel.

The March 11, 2008 *Powell* fee and cost orders are both applicable and inapplicable to the resolution of the *Perez* fees and costs motion. Both cases necessitated the appointment of a Special Master to aid the parties in streamlining the litigation. *Powell* was filed in May, 2005 and ended in August, 2007 while *Perez* was filed in September, 2006 and ended in September, 2007. Similar considerations in *Powell* which required the appointment of a Special Master were also present in *Perez*. The *Powell* fee order recognized that the "Plaintiffs' counsel was never able to grasp or was unwilling to acknowledge the simple nature of this case" (*Powell*, D.E. # 543 at 6.), and failed to "exercise critically important independent judgment." (*Powell*, D.E. # 543 at 7.) The *Powell* fee order also found that Plaintiffs' damage assessments and demands were unreasonable and without legal or evidentiary foundation. (*Powell*, D.E. #543 at 7.)

Based on my involvement in both cases, I would agree that some of the same deficiencies in Plaintiffs' counsel's work product identified by the Court in *Powell* were also present in this case. For example, Plaintiffs' initial damage calculations in this case like *Powell*, were "patently unreasonable and without legal or evidentiary foundation" which unnecessarily complicated the litigation process. However, the *Powell* fee orders are also inapplicable in several significant respects. Most significantly, the *Powell* fee order reduced the fees requested based on a "results

obtained" factor which does not apply here based upon agreement of the parties.

II. MOTION FOR AWARD OF ATTORNEYS' FEES

Section 216(b) of the Fair Labor Standards Act authorizes an award of attorney fees and costs to the prevailing party in actions to recover unpaid minimum wages and overtime compensation. 29 U.S.C. § 216(b). A plaintiff's entitlement to an award of reasonable attorney's fees depends on a three-step process. First, a plaintiff must have "prevailed" in the statutory sense. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Second, a lodestar figure is calculated representing the number of hours (tempered by billing judgment) spent in the legal work on the case, multiplied by a reasonable market rate in the local area. *See ACLU of Georgia v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999); *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996). Finally, the court may adjust the lodestar to account for considerations that have not yet figured in the computation, the most important being the relation of the results obtained to the work done. *See Hensley*, 461 U.S. at 434.

I recognize the broad remedial purposes of the FLSA and its anti-retaliation provisions. Congress's goal in enacting the FLSA was "to protect all covered workers from substandard wages and oppressive working hours . . . [and] labor conditions [that are] detrimental to the maintenance of the minimum

standards of living necessary for health, efficiency and general well-being of workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). Indeed, fees awards are mandatory, as opposed to discretionary, to the prevailing plaintiff in FLSA cases. *Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987). I also recognize the strong public interest served by the private enforcement of the FLSA and other civil rights laws and the role served by attorney fee awards to ensure the private enforcement of these laws. As recognized by the Court in its *Powell* fee order, "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be measured solely in monetary terms." (*Powell*, D.E. #543 at 6) (citations omitted).

A. Reasonableness of the Hours Expended

The fee applicant bears the burden of demonstrating entitlement to a number of hours reasonably expended. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). Rather than focusing on "atomized line-items," Supreme Court and Eleventh Circuit precedent contemplate a task-by-task examination of the hours billed. *See Comm'r, INS v. Jean*, 496 U.S. 154, 161-162 (1990); *Barnes*, 168 F.3d at 429. Besides ascertaining the reasonable number of hours an attorney spends in the handling of a case, the district court also analyzes the particular lawyering skills exhibited by the attorney. *See Norman*, 836 F.2d at 1301. Since I have participated in various aspects of proceedings in

this case, I am able to assess this particular element of the fee recommendation. Further, fee applicants are required to exercise "billing judgment" in preparing their award application and should exclude from the amount requested "excessive, redundant or otherwise unnecessary" hours, in addition to hours spent upon "discrete and unsuccessful claims." *Hensley*, 461 U.S. at 434; *Norman*, 836 F.2d at 1301-02.

In determining the number of hours "reasonably expended," hours that are excessive, redundant, or otherwise unnecessary should be excluded. *See Hensley*, 461 U.S. at 434. A reduction may also be made where the court determines that multiple attorneys were unnecessarily or needlessly used, or where the conduct of the prevailing party's attorneys needlessly consumed the court's time or unnecessarily prolonged the litigation. *See e.g., St. Fleur v. City of Ft. Lauderdale*, 149 F. App'x 849 (11th Cir. 2005) (no abuse of discretion in reducing fee award by 30% where attorneys sought fees for time spent on discrete unsuccessful claims, duplicated efforts, billed for administrative tasks, and billed at full rates for non-legal tasks). The court's calculation must also take into consideration whether, and how much, time was expended on non-compensable legal work that was unrelated to the FLSA retaliation claim on which the plaintiff prevailed. *St. Fleur*, 149 F. App'x at 853.

While the District Court is required to give some explanation as to how it arrived at the number of compensable hours, it has been held that where a voluminous fee application is filed, the court is not

necessarily required to set forth an hour-by-hour analysis of the fee request, but may make across-the-board percentage cuts if it adequately explains the reasons for the reduction. *Villano v. City of Boyton Beach,* 254 F.3d 1302 (11th Cir. 2001); *Freiler v. Tangipahoa Parish Bd. of Educ.,* 185 F.3d 337 (5th Cir. 1999), *cert, denied,* 120 S. Ct. 2706 (2000); *Gates v. Deukmejian,* 987 F.2d 1392 (9th Cir. 1992); *Daggett v. Kimmeiman,* 811 F.2d 793 (3d Cir. 1987) (10% reduction of hours for duplication). Inadequate and imprecise documentation of the time spent may also justify a reduction in the fee award. (*See, Powell,* D.E. # 543 at 20.)

Plaintiffs seek reimbursement for a total of 707.9 hours of attorney time with 633.3 expended by attorney Kleppin and the remaining 74.4 incurred by attorneys Glasser (34.8) and Boreth (39.6).[6] Defendants argue that a reduction of Plaintiffs' requested fee is appropriate because the fee motion: (1) contains numerous inaccuracies; (2) failed to establish their legal entitlement for fees for certain enumerated activities; (3) provides incomplete time entries; (4) includes time entries from other litigation; (5) seeks fees for unnecessary discovery activities, clerical work and otherwise unnecessary and duplicative work; (6)

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[6] The Eleventh Circuit has held that "(a) well prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case," *Norman,* 836 F.2d at 1303. Plaintiffs' fee petition does not include any summary or make any effort to group activities according to the stage of the case.

seeks excessive time for certain activities; and (7) seeks fees for time incurred as a result of Plaintiffs' own failure to provide timely and meaningful damage calculations. (D.E. # 104 at pp. 1-2). Based on a review of the litigation, the parties' submissions and applicable law, certain time entries, as listed below, should be reduced or disallowed.

1. Attorney Kleppin

As set forth in the chart below, as to Attorney Kleppin, I have reduced and disallowed requested compensable attorney time expended in several general categories, grouped as follows: (a) attorney time related to the defense of Plaintiffs' depositions; (b) attorney time expended on conducting depositions; (c) attorney time expended on the counterclaims; (d) attorney time expended on damage calculations; and (e) attorney time entries which are unclear or imprecise.

Since the Plaintiffs and Plaintiffs' counsel were already familiar with related issues from *Powell,* I found the time expended by Plaintiffs' counsel in connection with the preparation in defense of Plaintiffs' depositions to be excessive. Many of these time entries related to the work were also imprecise. Similarly, since many of the individuals deposed by Plaintiffs' attorney had already been deposed before in similar prior litigation, I found fees for time requested in connection with the depositions taken by Plaintiffs' counsel to be excessive. Many of these time entries were also imprecise. I disallowed attorney time related to the depositions of Danny Troyano and

Robert Davis since I did not find the time expended to be reasonably necessary to the prosecution of this case since they had little knowledge remotely relevant to the *Perez* litigation. Accordingly, I made these reductions to the hours requested based on my knowledge of the litigation, my observation of the litigation activities of counsel, my review of the parties' submissions, items in the court's docket and the overall litigation history.

Attorney time expended on the counterclaims was disallowed consistent with Plaintiffs' view that the counterclaims were unrelated to the prosecution of their FLSA retaliation action. (*See* D.E. #38) (Plaintiffs' Motion to Dismiss Counterclaim); *Hensley*, 461 U.S. at 434; *Norman*, 836 F.2d at 1301-2.[7]

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[7] In Plaintiffs' Motion to Dismiss the Counterclaim, they recognized the issues raised in the Counterclaim regarding the continuing validity of the IO agreements were separate and discrete from the issues litigated in their FLSA retaliation claim. Plaintiffs argued that the issues in the Counterclaim did not arise under the same facts as the issues in their lawsuit and that "(w)hether the agreement is valid, invalid, or is in violation of law, [was] of no moment to the Plaintiffs' overtime and minimum wage claims." (D.E. # 27 at p.7). Plaintiffs' attorney time expended on the Counterclaim, even if otherwise compensable, would nevertheless be severely reduced for other reasons including the inefficient way Plaintiffs addressed the issue through their proffer and submitted declaration. *See* Order Granting Defendants' Motion to Strike Declarations. (D.E. # 77, #78). Consequently, even if otherwise compensable, Plaintiffs' counsel should have addressed the counterclaims with significantly less attorney time.

Additionally, time expended by Plaintiffs' counsel relating to back pay/damage calculations was reduced since the Plaintiffs' counsel's work product was riddled with deficiencies which caused excessive and unnecessary time expended on back pay and damage calculations.

Accordingly, the requested hours for which reimbursement is sought by Attorney Kleppin should be reduced by 141.2 hours from 633.3 to 492.1, as reflected below in the summary chart.

Description of Attorney Time	**Relevant Time Entries**	**Time Disallowed**	**Reason(s)**
Attorney time related to counterclaims	11/27/06 – 2.4; 12/1/06 – .3; 12/4/06 – 4.8; 12/7/06 – 4.6; 12/8/06 – 4.3; 12/22/06 – 3.8; 5/30/07 – .2; 5/30/07 – .2; 5/30/07 – .8; 5/30/07 – 1.2; 5/31/07 – .8; 6/1/07 – .1; 6/6/07 – 3.0; 6/6/07; – 2.3; 6/18/07 – 2.7; 6/19/07 – .1; 6/25/07 – .2; 6/26/07 – .5; 7/25/07 – 2.0	34.3	Non-compensable work as not related to prosecution of FLSA claims.

Attorney time related to Plaintiff Perez deposition	2/23/07 – 7.4; 2/23/07 – .1; 2/26/07 – 3.4; 2/28/07 – 11.4	7.0	Excessive time expended; Imprecise entries
Attorney time related to Plaintiff Rengifo deposition	3/2/07 – 7.4; 3/3/07 – 3.4; 3/4/07 – 3.7; 3/6/07 – 2.8; 3/7/07 – 10.5	10.0	Excessive time expended; Imprecise entries
Attorney time related to Plaintiff Alba deposition	3/7/07 – 3.8; 3/8/07 – 3.9; 3/8/07 – 2.9; 3/9/07 – 9.0	5.0	Excessive time expended; Imprecise entries
Attorney time related to Plaintiff Pereira deposition	3/11/07 – 6.3; 3/11/07 – 3.0; 3/12/07 – .1; 3/13/07 – 8.5	4.0	Excessive time expended; Imprecise entries
Attorney time related to Plaintiff Humphreys deposition	3/14/07 – 2.7; 3/14/07 – 3.9; 3/16/07 – 6.0	2.0	Excessive time expended
Assembled documents	3/17/07 – 4.3	2.5	Imprecise entries; Unclear
Attorney time related to Plaintiff Maksimcev deposition	3/21/07 – 4.2; 3/22/07 – 5.2; 3/25/07 – 3.0; 3/29/07 – 2.0; 3/30/07 – 6.0	4.0	Excessive time expended
Attorney time related to Plaintiff Mazzeo deposition	3/27/07 – 3.2; 3/28/07 – 6.1	2.0	Excessive time expended; Imprecise entries

Attorney time expanded on Troyano deposition	4/10/07 – 3.8; 4/11/07 – 4.0; 4/12/07 – 4.3	12.1	Unnecessary Work
Attorney time expended on Kessler deposition	3/1/07 – 2.0; 4/11/07 – 5.2; 4/12/07 – .8; 4/13/07 – 4.7; 7/23/07 – 7.4; 7/26/07 – 7.5; 7/25/07 – 7.4	10.0	Excessive time expended; Imprecise entries
Attorney time expended on Richardson deposition	4/8/07 – 6.4; 4/9/07 – 9.0	3.0	Excessive time expended; Imprecise entries
Attorney time expended on Sobol deposition	7/8/07 – 9.2; 7/9/07 – 3.9; 7/9/07 – 17.4	6.0	Excessive time expended; Imprecise entries
Pay Records Review	3/26/07 – 4.5	2.0	Unclear as to task, excessive; imprecise entries
Attorney time expended on Davis deposition	7/20/07 – 8.5	4.0	Unnecessary Work; Imprecise entries
Review of Letter	6/11/07 – 5.2	2.5	Unclear, not precise as to activity, excessive

Attorney time re: client meetings, attorney meetings, etc.	6/20/07 – 6.9	3.0	Multiple tasks, redundant/unclear, not precise as to activity, excessive
Attorney time expended on Bugino deposition	7/11/07 – 5.7; 7/12/07 – 5.5	2.0	Excessive time expended; Imprecise entries
Work regarding depositions not taken	7/12/07 – 1.9; 7/13/07 – .1; 7/13/07 – .2; 7/13/07 – .4; 7/13/07 – .9	2.0	Excessive time expended; Unnecessary Work
Attorney time expended on Larry Sachett deposition	7/10/07 – 3.7; 7/18/07 – 15.7	5.0	Excessive time expended; Imprecise entries
Attorney time; reviewing documents re: damage calculations	7/22/07 – 10.4	2.0	Excessive time expended
Attorney time re: damage calculations	7/24/07 – 2.0	.5	Excessive time expended
Attorney time re: damage calculations	7/25/07 – 8.2	2.0	Excessive time expended
Damage calculations	7/26/07 – 4.9	1.0	Excessive time expended

Settlement terms	8/20/07 – 8.6 (total)	2.0	Excessive time expended; Imprecise entries
Discovery work after cases were settled	9/26/07 – 5.7; 9/27/07 – 5.6	11.3	Work was not necessary; Imprecise entries

2. Attorneys Boreth and Glasser

Attorney Boreth seeks reimbursement for 39.6 attorney hours and Attorney Glasser seeks reimbursement for 34.8 hours. Unfortunately, Plaintiffs' fee submissions for Attorneys Boreth and Glasser, like that submitted for Attorney Kleppin, do not "include a summary, grouping their time entries by the nature of the activity or stage of the case." *Norman,* 836 F.2d at 1303.

As to Attorney Boreth, I find that none of his requested time is compensable. *See Powell*, D.E #543 at 16. Based on the Plaintiffs' submissions provided to the undersigned, it was not clear how Attorney Boreth's work contributed to the prosecution of the lawsuit and did not otherwise duplicate the work performed by Attorneys Kleppin and Glasser. The overall quality of the Plaintiffs' attorneys' work product does not reflect guidance or direction from a senior attorney. As to Attorney Glasser, I find that he

is entitled to reimbursement for 29.1 hours.[8] Mr. Glasser's time expended at mediation and settlement contributed to Plaintiffs' prosecution of the lawsuit.

B. Hourly Rate

I recommend the hourly rate for Attorney Kleppin to be the same $175.00 rate as the rate determined by the Court in *Powell*. D.E. #543 at pp.17-18.[9] No hourly rate was set for Attorney Glasser in *Powell*. Based on my observation of the nature of the work performed by Mr. Glasser, his background and experience, and his limited participation in this lawsuit, I find the hourly rate of $ 350.00 to be reasonable for his time expended in this case. As in *Powell*, D.E. # 543 at 17, there was no evidence that Attorney Glasser guided or directed Mr. Kleppin through the prosecution of this case.

C. Lodestar

Considering the number of compensable attorney hours, categorized and explained above in Section A,

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[8] 8 Hours disallowed for Mr. Glasser were 2/6/07 –.5 (not necessary); 5/30/07 – 1.3 (duplicative); 6/18/07- 1.0 (not necessary); 6/28/07 – 2.9 (duplicative).

[9] At the time the parties agreed to have me issue this report and recommendation they were aware that I had intended to rely on the hourly rates utilized by the Court in the not yet issued *Powell* fee orders in my report. At that time, neither party objected.

as multiplied by the reasonable hours rates accepted for both attorneys as explained in Section B, the lodestar figure for Attorneys Kleppin and Glasser is as follows:

Attorney	Compensable Attorney Hours	Reasonable Hourly Rate	Total Lodestar Figure
Attorney Chris Kleppin	492.1	$175.00	$86,117.50
Attorney Lloyd Glasser	29.1	$ 350.00	$ 10,185.00
Total Lodestar			**$96,302.50**

III. MOTION FOR REIMBURSEMENT OF COSTS

Under Rule 54(d)(1), the reimbursement of costs paid in litigation "shall be allowed as of course to the prevailing party . . . " Fed.R.Civ.P. 54(d)(1). The decision to award costs to a prevailing party involves a three step process:

> The Court first determines what items may be taxed as costs in favor of the prevailing party; this determination is governed by 28 U.S.C. § 1920. Second, the Court determines the amount which may be taxed for each of these items; this determination is governed by 28 U.S.C. § 1821, Finally, the Court decides which of the costs should be taxed in a given case; this determination is governed by Fed.R.Civ.P 54(d).

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441 (1987); *Morrison v. Riechhold Chemicals, Inc.*, 97 F.3d 460, 463 (11th Cir. 1996). Moreover, 28 U.S.C. § 1920 defines the full extent of the federal court's power to shift litigation costs absent express statutory authority or a contract between the parties. *See West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991); *Parkes v. Hall*, 906 F.2d 658,659-660 (11th Cir. 1990); *Morrison*, 97 F.3d at 463. The Supreme Court held in *Crawford* that § 1920 "now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting*, 482 U.S. at 440; *See also*, *Morrison*, 97 F.3d at 463; *Parkes v. Hall*, 906 F. 2d 658, 659 (11th Cir. 1990) (costs awardable under Rule 54(d) are limited by § 1920). After *Crawford Fitting*, it is clear that a district court has no discretion to tax costs that are not expressly delineated in § 1920. These are:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under § 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters and salaries,

> fees, expenses, and costs of special interpretation services under § 1828 of this title.

28 U.S.C. § 1920. In addition to identifying under which provision of § 1920 a particular cost falls, a prevailing party seeking to tax costs to the non-prevailing party must provide the Court with sufficient information so that meaningful review is possible. Accordingly, this Court's local rules require that the prevailing party's motion "shall be stated with particularity." *See* S.D.Fla. Local Rule 7.3(c).

Plaintiffs have also filed a Verified Motion to Tax Costs. [D.E. # 100]. Plaintiffs argue they are entitled to costs pursuant to 29 U.S.C. § 216(b), 28 U.S.C. § 1920, 28 U.S.C. § 1921 and Rule 54(d). Specifically, Plaintiffs seek reimbursement of costs in the total amount of $ 24,605.45, categorized as follows:

1.	Service of Process Subpoenas, Witnesses	$ 1,418.80
2.	Copy Costs	$ 336.30
3.	Deposition Costs	$ 9,246.60
4.	Witness Fees for Deposition	$ 120.00
5.	Filing (Docket) Fees	$ 350,00
6.	Court-Appointed Expert Costs	$ 13,133.75

Defendants argue that Plaintiffs' requested costs should be significantly reduced or denied because some costs requested were unnecessary or are not taxable and/or because Plaintiffs did not establish their entitlement to the costs requested. (*See* D.E. # 103 at pp.1-2.)

Based upon my review of the parties' submissions and the appropriate law governing cost reimbursement, I recommend that the Plaintiffs be awarded the following costs:

1. **Filing Docket Fees**

Plaintiffs should be awarded the $ 350.00 sought. *See* 28 U.S.C. § 1920(1).

2. **Cost of Photocopying**

Under § 1920(4), photocopying "necessarily obtained for use in the case" is compensable. *See McGregor v. Board of County Commissioners for Palm Beach County,* 130 F.R.D. 464, 465 (S.D.Fla. 1990), *aff'd,* 956 F.2d 1017 (11th Cir. 1992); *Scelta v. Delicatessen Support Services, Inc.,* 203 F.Supp.2d 1328, 1340 (M.D.Fla. 2002). Photocopies are "necessarily obtained for use in the case" when "the prevailing party could have reasonably believed that it was necessary to copy the papers at issue." *United States E.E.O.C. v. W & O. Inc.,* 213 F.3d 600, 623 (11th Cir. 2000), *r'hg en banc denied*, 223 F.3d 580 (11th Cir. 2000). The burden of establishing entitlement to photocopying expenses lies with the prevailing party. *See Desisto College, Inc. v. Town of Howey-in-the-Hills,* 718 F.Supp. 906, 910, n. 1 (M.D.Fla. 1989), *aff'd,* 914 F.2d 267 (11th Cir. 1990) (holding that copies of pleadings, discovery, documents tendered by the opposing party and documents prepared for the court's consideration were recoverable costs).

Plaintiffs seek $ 336.30 as reimbursement for the costs of photocopying. Although the supporting documentation for copying costs is confusing, I find the total amount requested as reasonable in view of the litigation as a whole.

3. **Witness Fees for Deposition**

Under this category, Plaintiffs seek reimbursement for $ 120.00 as witness fees for Troyano, Richardson, and Davis. While witness fees are a taxable costs under 28 U.S.C. § 1920(3), the depositions of Troyano and Davis were not necessary. Therefore, witness fees for Troyano and Davis are disallowed. Plaintiffs shall be awarded $40.00 for this category.

4. **Service of Process, Subpoena Witnesses**

Under this category, Plaintiffs seek $ 1,418.80. (*See* D.E. # 100 at pp.4-5.) While fees for service of process and subpoenas are taxable costs under 28 U.S.C. § 1920, the fees incurred related to Robert Davis, Danny Troyano, Key Transportation, Aventura Limousine, Mike Kastelic and Stacy Chanbani were unnecessary. Fees relating to these witnesses and entities in the sum of $339.00 will be disallowed. Plaintiffs shall be awarded $ 1,079.00 for this category.

5. **Deposition Transcripts and Attendance Fees**

Section 1920(2) permits the recovery of the costs of deposition transcripts "necessarily obtained for use in the case." "The question of whether the costs for a

deposition are taxable depends on the factual question of whether the deposition was wholly or partially 'necessarily obtained for use in the case.'" *W&O, Inc.* 213 F.3d at 620-21); *Weber v. Slingsby Aviation Ltd.*, Case No. 98-2223, 2001 U.S.Dist. LEXIS 10350 * 3-4 (S.D.Fla., June 7, 2001) ("it is the job of the Judge to determine which depositions, if any, were 'necessarily obtained for use in the case.'"). "[A] deposition taken within the proper bounds of discovery will normally be deemed to be 'necessarily obtained for use in the case' and its costs will be taxed unless the opposing party interposes a specific objection that the deposition was improperly taken or unduly prolonged." *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 994 (N.D.Ga. 1982) quoting *Jeffries v. Ga. Residential Fin. Auth.*, 90 F.R.D. 62, 63 (N.D.Ga. 1981). Likewise, depositions relied upon for summary judgment *motions* are taxable. *Helms v. Wal-Mart Stores, Inc.*, 808 F. Supp. 1568, 1572 (N.D. Ga. 1981), *aff'd*, 998 F.2d 1023 (11th Cir. 1993). Deposition costs merely incurred for convenience, to aid in thorough preparation or for purposes of investigation only, are not recoverable. *See Weber*, 2001 U.S.Dist.LEXIS 10350 *3-4. The burden is on the party seeking taxation of the deposition costs to show that the deposition was necessarily obtained. *See Nat'l Bankcard Corp. v. VISA U.S.A., Inc.*, 112 F.R.D. 62, 66 (S.D.Fla. 1986) (costs for unspecified deposition costs not allowed).

Plaintiffs seek $ 9,246.60 as attendance and deposition fees associated with the depositions of

Richardson, Troyano, Bugliano, Kessler, Sobol, Sachett, Davis, Rocia, Clark Perrara, Werdebaugh, and for hearing transcripts of proceedings before the Special Master on August 21, 2007 and June 13, 2007. The *Powell* cost order addresses reimbursement for deposition transcripts. *See Powell,* D.E. # 542 at 13-16. Applying the same analysis here, I find that the deposition transcript of Danny Troyano, at a cost of $ 1,708.87, was not necessary for the prosecution of this lawsuit. The remainder shall be compensated.

6. **Court Appointed Expert Fees**

Plaintiffs seek reimbursement for costs incurred in connection with the appointment of the Special Master as a Court appointed expert pursuant to 28 U.S.C. §1920(6). (*See* D.E. # 65, p.12). Defendants correctly point out that the Special Master is not a "court appointed expert." In the Court's Order of Appointment, I was permitted to apportion my costs among the parties. (*See*, I.d.) Pursuant to that authority, I find that the Special Master costs should be shared equally by the parties. I base this decision on the reasons for my appointment, the role that I played in the proceedings and my observation of the litigation.

7. **Costs Awarded**

As set forth above, the following costs will be awarded:

Items For Which Plaintiffs Sought Reimbursement	Costs Sought	Costs Awarded
Service of Process Subpoenas, Witnesses	$ 1,418.80	$1,079.00
Copy Costs	$ 336.30	$ 336.30
Deposition Costs	$ 9,246.60	$7,537.13
Witness Fees for Deposition	$ 120.00	$40.00
Filing (Docket) Fees	$ 350.00	$350.00
Court-Appointed Expert Costs	$13,133.75	
Total		$9,342.43

IV. SETTLEMENT HEARING TRANSCRIPT

On May 2, 2008, the parties submitted memoranda regarding the applicability of the *Powell* fees and costs Orders to this case. Immediately prior to the deadline for submission of these memoranda, I was advised by Plaintiffs' counsel that they intended to quote extensively in their memorandum from a transcript of the August 21, 2007 hearing held to discuss disputed language in the parties' settlement agreement. Plaintiffs' counsel also advised that they intended to file the August 21, 2007 settlement hearing transcript with the Court. Upon Defendants' objection to the filing of the transcript, the parties agreed to submit their memoranda directly to me and not to file with the Court any memoranda which cited the settlement hearing transcript pending my resolution of whether the August 21, 2007 transcript was a privileged communication relating to settlement.

I have reviewed the parties' memoranda and the transcripts of the August 21, 2007 hearing. The August 21, 2007 hearing was held because the parties agreed to the essential terms of settlement, but could not come to terms on the language to be included in the written settlement agreement which incorporated those terms. A court reporter was present at the August 21, 2007 hearing to protect a party's right to appeal language which I ordered be included in the parties' written settlement agreement.[10]

Since the hearing was convened solely for the purpose of facilitating the settlement of the case, the parties' communications during the hearing were settlement generated and related, and the Plaintiffs do not challenge the language of the settlement agreement, I find that neither the transcript of the August 21, 2007 hearing nor submissions containing quotes from that hearing should be filed with the Court. The entire proceeding was a privileged communication under Rule 408 of the Federal Rules of Evidence.

V. RECOMMENDATIONS

For the reasons set forth above, the Special Master recommends:

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[10] The parties agreed that, in the event that they could not agree on language to be included in their written settlement agreements, I would be specifically called upon to decide what language should be included.

1. That this Court **GRANT IN PART** Plaintiffs' Motion For Attorneys' Fees [D.E. # 99] and enter Judgment in favor of Plaintiffs and against all Defendants, jointly and severally, for attorneys' fees in the amount of $96,477.50;

2. That this Court **GRANT IN PART** Plaintiffs' Motion to Tax Costs [D.E. # 100] and enter Judgment in favor of Plaintiffs and against all Defendants, jointly and severally, for costs in the amount of $9,342.43; and

3. That the parties not be permitted to rely on or file the August 21, 2007 hearing transcript with the Court.

Pursuant to Magistrate Rule 4(a), the parties may file written objections to this Report and Recommendation with the Honorable Patricia A. Seitz no later than ten days following entry of this report. No party will be permitted to file a response or reply to the other party's objections. Failure to timely file objections shall bar the parties from attacking on appeal any factual findings contained herein. *See RTC v. Hallmark Builders,Inc.,* 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Lugger,* 847 F.2d 745, 749-50 (11th Cir. 1988).

RESPECTFULLY SUBMITTED, in Miami, Florida this 2nd day of July, 2008.

/s/ Robert E. Weisberg
ROBERT E. WEISBERG
SPECIAL MASTER

cc: The Honorable Patricia A. Seitz
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16115-FF

OSCAR PEREZ,
FRANCISCO, RENGIFO,
JOHN HUMPHREYS,
JUAN ALBA,
WILHELM PERIERA,
ED MAZZEO,

Plaintiffs-Counter-
Defendants-Appellants,

MIOMIR MAKSIMCEV,
GEORGE POWELL,

Plaintiffs-Appellants,

DIMITRE KARABOYTCHEV, et al.,

Plaintiffs,

LAW FIRM OF GLASSER,
BORETH & KLEPPIN, P.A.,

Interested Party-Appellant,

versus

CAREY INTERNATIONAL, INC.,
a Delaware corporation qualified to
do business in the State of Florida,
CAREY LIMOUSINE FLORIDA, INC.,
a Delaware corporation qualified to
do business in Florida,

CAREY INTERNATIONAL, INC.,
a Delaware corporation qualified to
do business in the State of Florida,
CAREY LIMOUSINE FLORIDA, INC.,
a Delaware corporation qualified to
do business in Florida,

Defendants-Counter-
Claimants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(May 28, 2010)

Before: O'CONNOR, Associate Justice Retired, CARNES * and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing

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* Honorable Sandra Day O'Connor, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/ E. Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)